THE

MONTHLY LAW REPORTER.

AUGUST, 1864.

THE LEGAL STATUS OF THE REBEL STATES BEFORE AND AFTER THEIR CONQUEST.

THERE is manifested a tendency at this time in the Union party to separation. The elements of discord are seen in a divergency of views among its leading members upon the constitutional status of the rebel States, and the power of the President and Congress over them, when once they have been conquered by the Union armies. Some minds appear disposed to carry out their notion reckless of law and constitution, while others hesitate in the performance of acts clearly legal and constitutional. It hence becomes important to study these questions as questions of constitutional law, independent of every other consideration. Law is not to be changed at every change in our domestic and interior condition; that must remain unimpaired and in its integrity, whatever may be the necessities of the moment. The Constitution cannot be varied in its interpretation and construction to meet the wishes of this or that set of men, the emergencies of the present, the past, or the future.

We have never had occasion before this to study the Constitution in the aspect in which this gigantic rebellion presents it to the public mind: we have studied carefully its powers as exercised in a time of peace, and also as exercised in the prosecution of a foreign war. We are now in the midst of a civil war, a new position for the nation to be placed in; we now are compelled to read the Constitution anew in the light of this great fact, and ascertain, if we can, what relations exist between the Federal Government and the rebel States, and what power Congress and the President can constitutionally exercise over

the rebel States in prosecuting the work of their subjugation and in governing and pacifying them after they shall have been conquered. The legal mind has been too ready to apply the law in such a time as it was applied in a time of peace, overlooking the vital fact that the two conditions are widely different and must each require the application of a different law. What may be illegal in a state of peace may be eminently legal and constitutional in a time of war. The powers brought into play in a civil war must be different from those exercised in a time of peace, or of even of a foreign war. A disregard of this important distinction has led to many hasty and crude notions, which would strip the war power of that promptness, rapidity, and energy in its action so imperatively demanded in all military movements.

There is another preliminary consideration which I may here interpose. The subject of slavery has nothing to do with the question involved in this discussion. The law is the same, whether applied to a free or a slave State, to Massachusetts or to South Carolina. What is the relation of a State in rebellion to the Federal Government, and what are the powers that the President and Congress can exercise in putting down the rebellion and governing the rebel States after having conquered them? Slavery has nothing to do with the solution of these questions, since that solution must be one which is as applicable to Massachusetts as to South Carolina.

Let us, then, proceed to the examination of the questions involved as pure questions of law settled by publicists and judicial decisions. In doing this I shall state the various propositions, and refer to the writers and decisions which bear upon and sustain them.

1. The law of nations, or, as Wheaton calls it, international law, is a part of the law of the United States. In the case of the Nereido, 9 Cranch Rep. 388, MARSHALL C. J. says, "Till such an act be passed, *the court is bound by the law of nations, which is a part of the law of the land.*" Ib. 423. This doctrine has been repeated just as often as a question of prize has come before the Supreme Court of the United States.

2. The *laws of war* are a part of the law of nations, and so a part of the law of the United States. Wheaton, 506. Vattell, 291. The *international rights of states in their hostile relations* constitute a part of every treatise on the law of nations, wherein are laid down the laws of war in all its aspect, whether foreign or civil. The Constitution empowers Congress to declare war, *suppress insurrections*, and repel invasions (Ar-

ticle I. § 8); not one word is said as to the mode or manner in which war shall be prosecuted; this is left to be settled by that code, well known to the men who made that instrument, as *the laws of war*. Hence, if we seek to comprehend the mode of prosecuting war, the rights and powers of the belligerents engaged in it, we must look elsewhere than to the Constitution, which is silent on all these matters; we can look nowhere else than to the *laws of war* as expounded by publicists and courts; these are laws which govern all civilized nations, and cannot be altered or modified but by the consent of nations; no one belligerent nation can rightfully change one of its rules in its intercourse with another nation; such an effort would be a public wrong to all other nations, and a just cause of war. It was by this construction of the Constitution that it was held we had constitutional power to purchase Louisiana and Florida, to hold California and New Mexico by conquest, and Oregon by discovery. By the law of nations, to acquire territory by purchase, conquest, and discovery is a necessary incident to every nation. The war-power granted to Congress in the Constitution necessarily carries with it all the incidents and circumstances attached to it by the law of nations.

3. If, then, we wish to know what powers can be legally exercised by the Federal Government in the suppression of this rebellion and over the rebel States, we must look for instruction on these various topics to the writers and decisions of court on the laws of war; it is to these laws that we intend to resort in the present inquiry to settle the vexed questions which for the first time are presented to the American mind in the history of the nation. Events are being our teachers; the irresistible logic of facts now transpiring is throwing new light on the powers of the Constitution, and revealing new views to minds hitherto inattentive to such discussions; we are unlearning many old prejudices and learning some new truths.

4. The present war is not simply an *insurrection;* it is a *civil war*. This is an important distinction, one of which we must not lose sight. An insurrection is the rising of a body of persons seeking by force to resist the execution of the laws and the authority of the government, so that the sovereign authority is no longer obeyed. Wheaton, 522; Vattell, 421. In the case of a mere insurrection, the rebels have no organized government; they act as a mere mass of individuals under a mere leader, to obtain their ends by force. Such were the rebellion of Shays in Massachusetts, and the whiskey rebellion in Pennsylvania. The States, as States, remained loyal to

the Union and the Federal authority; and hence, in such a case, whatever is done, is the act of the individual engaged in doing it. The citizens of the State in which the insurrection is raging, through the agency of the State government, remain loyal, and cannot be made responsible for whatever may be done by those in insurrection, Criminality alone attaches to them, since the people in their *corporate and social capacity as a State*, have remained faithful and loyal to the Constitutions of the State and the United States.

But a CIVIL WAR is more than this. "When a party is formed in a State, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him, or when in a republic the nation is divided into two opposite factions, and both sides take up arms, this is called a *civil war*." Vattell, 424, § 292. "When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." "The true test of the existence of a *civil war*, as found in the writings of the sages of the common law, may be thus summarily stated; when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, *civil war* exists, and *hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land*." Per Grier J. 2 Black. 635, 637. On these principles, the Supreme Court of the United States in the prize cases, 2 Black. 635, decided that the war now raging in the United States was a *civil war*, of the existence of which all courts of justice are bound to take notice, and that this civil war had existed from the issue of the President's proclamation on the 27th and 30th days of April, A. D. 1861. This is an authoritative adjudication, and settles the question for us, since it is the decision of the court of last resort on such a question; nor can any doubt be thrown upon this its legal correctness. This war, then, is a *civil war*, and the laws of war applicable to such a war are to be applied to its prosecution.

5. What, then, is the law regulating the conduct and relations of parties involved in a *civil war?* "When a nation, says Vattell (427, § 295), becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, *the war between the two parties stands on the same ground in every respect as a public war between two different nations*."

"They decide their quarrel by arms, as two different nations would do, and the obligation to observe the common laws of war towards each other is, therefore, absolute, — indispensably binding on both parties; the same which the law of nations imposes on all nations in transactions between State and State." "A *civil war*," says Wheaton (520, § 7), "between the different members of the same community or society, is what Grotius calls a *mixed war*; it is, according to him, *public* on the side of the established government, and private on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling *both* the contending parties *to all the rights of war* as against each other, and as respects neutral nations." "As true civil war breaks the bands of society by dividing it in fact into two independent societies, it is for this consideration that we treat of it in international law, since, each party forming as it were a *separate nation*, *both* should be regarded as *subject to the laws of war*." (Riquelme, cited Lawrence's notes to Wheaton, 523.) "Hence," says Mr. Justice Grier, 2 Black. 667, "*hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land*." "The laws of war," he continues, "as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by this scourge of war; hence the parties to a *civil war* usually concede to each other *belligerent rights;* they exchange prisoners, and adopt the other courtesies and rules common to public or national wars." 2 Black. 667. In these cases the Supreme Court held that a *civil war* existed and could be prosecuted on the same footing as if *those opposing the government were foreign invaders*. 2 Black. 636.

These authorities settle beyond all debate, as far as a legal question can be settled, that the relation existing between the Federal Government and the rebel government and the rebel States is the same as that existing between two independent nations engaged in war, and *that whatever law or laws would be applicable in the one case, the same are equally applicable in the other; both are alike entitled to and bound by the well-known laws of war.*

Such being the law, it follows as a logical necessity that the States in possession of the rebel authority are to be considered as if occupied by a foreign enemy, as if conquered by England or France in a war between us and them; and hence whatever would be the legal condition of this territory if con-

quered and held by England, the same will be its legal status under the present emergency; and whatever we could rightfully do against England if she held it, we can do against the rebels now in arms against the Federal Government. For this purpose the law of nations regards only facts; it has nothing to do with the right.

6. What, then, would be the legal status of these States, if conquered and occupied by a foreign nation? If we can settle this question by authority, then we settle what is the legal status of the rebel States, because the rebels are to be regarded, *de facto*, as a foreign foe invading our territory. Such is the express language of the court in the prize cases as cited above.

The first case to which we will refer is that of the *United States* v. *Rice*, 4 Wheat. 246. The case is briefly stated, and the opinion of the court is simply stated, not reasoned out. The case grew out of the occupation of Castine, in Maine, by the English, in the war of 1812. Goods had been imported into Castine during the English occupation, and were found there on its re-occupation by the United States. The action was brought to compel the owner to pay duties under the laws of the United States on these goods so imported into Castine. The court say, "that by the conquest and military occupation of a portion of the territory of the United States by a public enemy, that portion is to be deemed a *foreign* country so far as respects our revenue laws; that goods imported into it are not imported into the United States, and are subject only to such duties as the conqueror may impose; nor could the United States, after obtaining possession again of the territory, levy a duty on goods imported, while said territory was in the occupation of a foreign enemy." This case settles that when a foreign enemy conquers and occupies any part of our territory, that territory ceases, *de facto*, to be any part of the United States; and that from that territory the authority of the United States is not only excluded, but that our laws cease to be binding on the people residing within it. The authority of Great Britain was then paramount, and such laws operated there as Great Britain saw fit to enact or tolerate.

The next case is that of *Fleming* v. *Page*, 9 How. 603. This case grew out of the conquest and occupation of Tampico, in Mexico, by our armies, in the war with that government. The Mexican authorities had been expelled, or submitted to our army and navy, and the country was in the firm and exclusive possession of the United States, and governed by its military authorities, acting under orders of the

President of the United States. The question arose, What were the rights of the United States in this conquered territory? "It is true," says TANEY C. J., "that when Tampico had been captured, and the State of Taumaulipas subjugated, other nations were bound to regard the country, while our possession continued, as *the territory of the United States*, and to respect it as such. For by the laws and usages of nations, *conquest is a valid title*, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities; nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries."

In *Leitensdorfer* v. *Webb*, 20 How. 176, Mr. Justice Daniel, in delivering the opinion of the court, uses the following emphatic language: "This is the principle of the law of nations, as expounded by the highest authorities. In the case of the *Farna*, 5 Robinson 106, Sir William Scott declares it to be the settled principle of the law of nations, that *the inhabitants of a conquered territory change their allegiance*, and their relation to their former sovereign is dissolved." The same doctrine is laid down by the same court in the case of *The United States* v. *Perchiman*, 7 Pet. 86. "The people, say the court, speaking of the effect of conquest, change their allegiance, and their relation to their sovereign is dissolved." *Vide* also *Mitchel* v. *The United States*, 9 Pet. 711; 1 Kent Comm. 177.

These cases settle authoritatively the following propositions: 1. That territory of the United States conquered by a foreign enemy ceases to be territory of the United States, and becomes that of the conqueror; 2. That territory conquered by the United States from a foreign enemy becomes the territory of the United States, and belongs to them as exclusively as territory included within their legally recognized boundaries; 3. That the allegiance of the people is changed by conquest from their former government to that of the conqueror, and their relation to their former sovereign is dissolved by the simple acts of conquest and occupation.

Such, then, is the clearly settled law between nation and nation; but we have already shown that this same law is applicable to the relation between the Federal Government and the rebel States. These States, therefore, now in the occupa-

tion of the rebel authorities, do not, *de facto*, constitute a part of the United States; *the allegiance of the inhabitants included within them is changed*, de facto, *for the time being*, *from the United States to the* de facto *rebel government*, *and their relation to the government of the United States is dissolved*. This territory, these rebel States in rebellion, and their inhabitants, are, then, *de facto* no part of the United States; they constitute *de facto* a portion of the territory of a foreign power, so far as the United States are concerned, and to which power they are, for the time being, both subject, owing also to it a qualified allegiance. The people, then, of these States have not the rights of American citizens; they are *de facto* foreigners, and hence cannot be allowed either vote in the election of President, nor to send senators and representatives to Congress.

Some minds may be startled at this idea, as though it gave a sanction to treason; but that such is the law there can be no doubt. Such is the English law of treason; by that law, no person can be liable for treason in obeying the King *de facto*, the King in possession, even in keeping out the King *de jure*. 4 Black. Com. 77; 4 Comyns Dig. 736. The reason of this rule is that the *de facto* King, or government, must have power to protect those obeying it, or the people would be left in absolute anarchy; no one, in case of a disputed succession or authority, can know what to do, or when he is safe. Besides, in a war like the present, the law of treason cannot be enforced; if the one party indicts, tries and executes the partisans of the other for treason, retaliation must be the response; hence, instead of hanging traitors, we exchange them as prisoners of war. It is thus seen that the law of treason is a dead letter, while the war is being prosecuted; but the rebellion once crushed out, the civil law again comes into action, and all those who voluntarily aided or acted in resisting the constitutional authority can be indicted, tried, and executed for treason; but those who have simply obeyed the rebel authorities are not guilty of treason, and cannot, therefore, be punished; they simply obeyed a government *de facto*, possessed of sufficient authority to enforce its requisition and orders. If this were not the law, such men would be placed in a most unfortunate predicament; they would be shot if they refused to obey the government *de facto*, and hung if they did; besides, by the law as already stated, they do not owe *allegiance* for the time being to the Federal Government, and for this reason cannot be guilty of treason, a crime necessarily involving a violation of the duty of allegiance,

7. The next inquiry relates to the power of the Federal Government over the rebel States. While in possession of the rebel authorities, the power of the Federal Government is to be exercised in compelling these States by force to return to their allegiance to it. This is to be done by military force employed in destroying the rebel armies. It is unnecessary to waste time on the law regulating the mode of waging war; on this point there can be no conflict of opinion, so I shall pass it over in silence.

The debatable questions grow out of the conquest of these rebel States by our armies. What is the power or right of the Federal Government over the people and property of the rebel States, when once they shall be conquered and occupied by our armies? This inquiry naturally divides itself into two branches, the one relating to property, and the other to the political power; of these in their order.

And first as to property. This question may be dismissed in a few words. "We have a right," says Vattel, 364, § 161, "to deprive our enemy of his possessions, of everything which may augment his strength, and enable him to make war. The property belonging to the government of the vanquished nation passes to the victorious State, which also takes the place of the former sovereign in respect to the eminent domain." Wheaton, 597. In *Brown* v. *The United States*, 8 Cranch, 123, the court held that the power of *confiscating* enemy's property was in the legislature. When war breaks out, the question, What shall be done with enemy's property in our country? is a question rather of policy than of law. Wheat. 541. This case settles that Congress can by law confiscate the private property of rebels found within our jurisdiction; and thus, as our military occupation is extended, this rebel property will continue to come within our jurisdiction, and be subject to confiscation under the law of Congress. "According to strict authority," says Kent, 1 Kent's Comm. 56, "a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war."

In the present war, the private property of the rebels is being used by the rebel government to carry on the war; hence it becomes public property and is liable to seizure as such. By the law of the rebel congress, the rebel authorities are empowered to take possession of all private property for its own uses in prosecuting the war; such a law converts all private into public property, and justifies our armies, therefore, in taking

or destroying all property which can be converted to the purposes of war. So, too, all men between fourteen and sixty are liable to be taken as prisoners of war, since by the acts of the rebel congress all persons within these ages are enrolled in the army, and constitute a portion of it. Our armies, therefore, in taking all articles capable of being used for military purposes, are simply taking what the rebel government has declared to belong to it for war purposes.

The next question relates to the *political power* of the rebel States. This political power is there divided between a general government for the whole Confederacy, and a State government clothed with certain political powers; the State government is as much a *political* power as the general government. This is an important distinction, to lose sight of which will lead to inextricable confusion and endless contradictions.

The *political* power of a conquered people is transferred to the conquerer. MARSHALL C. J. (7 Pet. 86, *U. S.* v. *Perchiman*) says, "That on the conquest of enemy's territory the people change their allegiance, and their relation to their ancient sovereign is dissolved." Vattell, 389, § 201, lays down the law that the conquerer has the right to retain the sovereignty of the conquered State, and he also acquires the rights of the sovereign whom he has dispossessed. The same doctrine is asserted by DANIEL J. in *Leitensdorfer* v. *Webb*, 20 How. 177. He says: "In the case of the *United States* v. *Perchiman*, 7 Pet. 86, 87, this court has said, it may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conquerer to do more than to *displace the sovereign and assume dominion over the country*. The people change their allegiance, and their relations to their sovereign are dissolved." Vide also *Fleming* v. *Page*, 9 How. 614. *Cross* v. *Harrison*, 14 *id.* 164. These cases grew out of the conquest of portions of Mexico by our armies during the late war with that country; and the doctrine is maintained in all of them that on the military occupation of enemy's country the *political power*, *the power to govern*, passes from the people and their sovereign into the hands of the conquerer. The State as well as the central government was superseded by our authority, whenever we conquered any portion of its territory.

According to these authorities, whenever our army overruns and occupies any one of the rebel States, the *political* power of the State passes to the United States as the conquering power; it is not a part, it is the whole of the *political* power which is divested from the one and vested in the other. The *political*

power of the confederate States is divided, as in the United States, between the confederate government and the State governments. We may conquer a State without conquering the confederate government; we have conquered Tennessee, Louisiana, and Arkansas, States of the so-called confederacy. As the State governments constitute a portion of the *political* power of the confederate States, the whole *political* power of each of these States passes to the government of the United States; the confederate and State governments are both superseded by the Federal authority, and the whole executive, legislative, and judicial power of the State thus conquered and occupied by our military forces, becomes vested in the United States as the conquering power. Unless this is the case, then, the law of nations is not carried out, since the State political power would be left intact, and the proper officers could go on in the enacting of laws and the administration of justice. A nation, by dividing up its political power between local and central governments, would escape the consequences which by the law of nations are attached to the act of conquest. Whenever one of these States becomes conquered and occupied by our military power, all political power within it falls to the ground, ceases to act, and the only governing power existing therein is that of the conquerer. Whatever *political* power the confederate government exercised within the State, and the political power vested in the State government, the whole, constituting the political power of that State, becomes necessarily transferred to the conquering power, the government of the United States. If England were to conquer the State of Maine, would she leave the State government in action? She might do it, but the question here presented is, would she be *bound* to do it? If she was so bound, she would have a hostile government acting within her *own* territory, and in opposition to her own interests and authority. This would be simply absurd.

But it may be argued that when the United States reconquer these States, now held adversely by the rebellion, she is only reinvested with her orignal rights under the Constitution. This is true to a certain extent, to the full extent of her rights and power within a State of the Union. She is invested with the right of erecting forts, establishing custom-houses, and collecting duties, and of reëstablishing her District and Circuit Courts; but what becomes of the political power vested in the States? This does not belong to the United States under the Constitution, and hence the United States is not by reconquest reinvested with this political power, since it never was vested

in the Federal Government. If, then, the political power of the State is not by the laws of war vested in the Federal Government, it must remain with the people of the State, where the Constitution of the United States leaves it; and if left to the people of the State, then it is left in the hands of the whole people, according to the provisions of the State Constitution; and the majority of the people, through their constitutional organs, must continue to exercise this power. But this majority is made up of rebels, and hence such a view of the law would leave the political power of the rebel States, even after conquest, in the hands of rebels. The notion some have suggested, that the political power of the State reverts to the loyal part of the people, is not only absurd, but impracticable. Who is to decide who is and who is not loyal? Is there any means afforded by a State Constitution, for a minority of the people of a State to carry on the functions of government? Where is the law to be found justifying any such result? It is not found in the laws of war, and surely it cannot be found written either in the Constitution of the United States, or of any State. If, on the other hand, these powers of government are by the laws of war vested in the United States, then the States continue to exist *as States*, with all their legal divisions into counties, townships and parishes. Such would be the condition of things if a State were conquered by a foreign enemy, and hence must be now, since the same law, we have seen, is applicable in the two cases.

It is said that these acts of secession are illegal, and therefore void, and that a void act can have no effect whatever. This may be true, when speaking *de jure*, but it is not true in fact. These States did rebel *as States*, says GRIER J. in the Prize Cases. The fact we know to be so, the legislatures of the several States having by an act of legislation dissolved their connection with the Federal Government, and formed a new connection with the so-called Confederate States. In all this the people acted in their *social* and *corporate* capacity, acted *as States*, and not as individuals. The *fact*, then, is beyond dispute, whatever may be the theory, that these *States* have thrown off their allegiance to the Federal Government, and formed new political relations inconsistent with their obligations to the Federal authority. As States they are carrying on this war, or are aiding in doing it. If we compare this public corporation called a State with private corporations, we may by analogy learn that a corporation may lose its franchise by the illegal acts of a majority of its members. The rights of the

innocent are in such a case sacrificed; forfeited by the action of the majority. What is true of a private corporation is equally true of a public corporation; all the members are equally involved in the consequences of the illegal acts of the majority. "Every man," says Kent, 1 Kent Com. 55, "is in judgment of law a party to the acts of his own government. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments." Vattell, 321, § 70. By the law of nations, here is a government *de facto*, representing the people of a State, and that *de facto* government is working all the power of the State in aid of the rebellion, and for this illegal act *all the people* are equally responsible, whether they approve or disapprove of it. Is there no responsibility for this corporate and social act of the whole people?

The people are by our Constitution clothed with the power of self-government; it is their franchise. If this franchise, this right of governing, belonged to a single person, called a prince or duke, and he had rebelled against his suzerain, can there be any doubt that he would have forfeited to his superior his franchise, his right of government, by this act of disloyalty, when conquered by his suzerain? History is full of such forfeitures. The people here stand in the place of the duke, and shall they not also forfeit their franchise, their right to govern themselves by a like act of disloyalty and rebellion? It would be strange if such were not the law.

We may look at the question in still another light. The Court, in the Prize Cases cited above, say that "*the question is to be regarded as though the rebel States were overrun by a foreign* ENEMY." Let us suppose a State overrun by France, a State government organized under her protection, and that then we reconquered the State; would we not put down this State government as well as drive out the authority of France? Would we leave standing a government filled with the creations of France? And if the people were disloyal enough to wish to keep up such a government, could we allow them to do it? Now that is just the condition of the rebel States; they wish to keep up their disloyal governments, and can we permit it? Where can the law be found which compels us to do it?

In every aspect in which we can view this question, we are conducted to the same conclusion. The conquest of a rebel State puts an end to its State government; the State government, *de facto*, ceases to exist; the people of the State have no State government; in such a contingency, who has the right to

step in and govern this people and State? The law of nations says that to the conquering States is transferred this political power, and to her is intrusted the right of government once vested in this conquered people.

We thus hold it for settled law that a State may lose its right to self-government by a corporate act of disloyalty, as well as an individual his property and life by a personal act of treason. On the conquest, then, of one of these States, the right to govern it is vested in the Federal Government.

8. The next question presented is, What can the Federal Government do with these States, thus by rebellion and conquest left without a government of their own? This question is really answered by the authorities already cited. If the political power of the State is vested in the United States, then the Federal Government must make and execute the law of the State, and provide for the administration of justice within it. The Federal Government possesses in this respect all the powers which the State government possessed in this respect.

This question has been twice presented to the United States' Supreme Court, and passed upon. The conquest of California and New Mexico by our armies in the late war with Mexico gave the occasion, and the court was called to decide upon the power of the Federal Government, the President, and Congress over territory conquered by our arms.

The first case to which we will refer is that of *Cross* v. *Harrison*, 16 How. 164. This case grew out of the conquest of California. The President had ordered the formation of a military government, and afterwards of a civil government in that State, and the question presented was the legality of this action of the President. President Polk, on the 23d of March 1847, had declared the right of the conqueror to levy contributions upon the enemy in their seaports, towns, and provinces, which may be in his military possession by conquest, and apply the same to defray the expenses of the war. He further declared that the conqueror possessed the right to establish a temporary military government over such separate towns or provinces, and to prescribe the terms of commerce with such places. Under this claim of authority on the part of the President, and under his orders, first a *military* and afterwards a *civil* government was established in California, which continued not only until the promulgation of peace, but until California was admitted as a State into the Union. In New Mexico only a military government was established, which continued during the war, and until Congress by law provided

for the organization of a territorial government. These governments legislated, organized courts, and performed all the functions of government. The legality of these governments and their proceedings came before that court on two several occasions, and drew from it formal decisions.

The first case was that of *Cross* v. *Harrison*, 16 How. 164. This related to the proceedings in California, and involved the legality of those laws passed for the collection of duties on importations. The court held, WAYNE J. delivering the opinion, that the formation under the orders of the President of a military, and afterwards of a civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory, and that it was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The next case is that of *Leitensdorfer* v. *Webb*, 20 How. 176. In this case it was held, DANIEL, J. delivering the opinion, that "the executive authority of the United States properly established a *provisional* government in New Mexico, which *ordained laws* and *erected* a *judicial* system; all of which laws continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the territorial government established by its authority."

These cases settle affirmatively four propositions: 1. The right of the President, as comander of the army and navy of the United States, to establish a military government over territory conquered by our arms; 2. The right of the President to supersepe this military goverment by a civil one organized under his permission or order; 3. That this provisional government will continue after the termination of the war, and until Congress shall by law provide other governments for this conquered territory; 4. The absolute power of Congress over this provisional government to abolish, supersede, and continue the same.

We think these propositions will be found to be fully sustained by the cases above referred to, and that of *Fleming* v. *Page*, 9 How. 603. These measures, so far as the President is concerned, are measures of war. The power of the President in such a case, says TANEY C. J. (9 *id.* 615), is simply that of a military commander prosecuting a war waged against a public enemy by the authority of the gov-

ernment; what he did in this respect is a measure of hostility, and a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army and cripple the enemy. "The government of which Col. Mason was the executive," says WAYNE J. (16 How. 193), "had its origin in the lawful exercise of a belligerent right over conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so; Congress could have put an end to it, but that was not done." Here the law is distinctly stated that Congress can put an end to these military governments organized by the President as a war-measure at any time it sees fit, nor did any one suggest the idea that the President could by any action of his extend the laws of the United States over this territory, or incorporate the same into the Union as one of the States thereof. "The territory had been ceded as a conquest," continues WAYNE J. (16 *id.* 193), "and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property of the United States, with power also to admit new States into this Union." The right to govern may be, say the court, the natural consequences of the right to acquire territory. 1 Pet. 542, 543. These citations sufficiently show that the powers of the President in creating such governments are simply measures of war, and they can be created for no other purpose; Congress alone has the authority to extend the law of the United States over such territory and create for it *permanent* governments, whether territorial or State.

As the rebel States are by the law of nations to be regarded *de facto* as *foreign* enemies in the prosecution of this civil war, whatever President Polk could do in the conquered States of California and New Mexico, President Lincoln can rightly do within any one of the rebel States when it shall be conquered by our arms; since the President, as military commander-in-chief, can rightfully establish either a military or civil government within the States when so conquered; but these govern-

ments, whether military or civil, are merely *provisional*, are merely war-measures, and can, therefore, have no other effect over the condition of the States than merely to govern them as conquered territory; Congress alone can convert this *provisional* government into a *permanent* one, and declare what shall be the political relation of these conquered States to the Federal Government.

9. The next question which arises is, What is the power of this provisional government over the people and territory where they are established? What effect does the creation of such a government have upon the laws of the conquered State, and what rights of legislation can it exercise therein?

"By this substitution of a new supremacy their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, *except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain.* Among the consequences which would be necessarily incident to the change of sovereignty, would be the appointment or control of the agents by whom, and the modes in which the government of the occupant should be administered; this result being indispensable, in order to secure those objects for which such a government is usually established." Per DANIEL J. (20 How. U. S. Rep. 177.) Lord Mansfield also lays it down as the doctrine of the common law, that conquered States retain their old laws until the conqueror sees fit to alter them. This doctrine must, however, be subject to the limitation given by Mr. Justice Daniel. *Rex* v. *Vaughn*, 4 Burn. Rep. 2500; Colvin's Case, 7 Coke, 176; *Hall* v. *Campbell*, Cowp. 209; *Gardner* v. *Fell*, 1 J & W. 27; *Spragge* v. *Stone*, Dacey, 38; *Strotter* v. *Lucas*, 12 Pet. 436; *Mitchell* v. *United States*, 9 Pet. 749; Vattell, 358.

The first effect of the conquest of a rebel State is that all its laws in conflict with the Constitution and laws of the United States become inoperative and void; they are repealed by the act of such occupation; it needs no act or legislation on the part of the President or Congress to put an end to all such laws; while all other laws, such laws as strictly come within the jurisdiction of State legislation, will continue in force until modified or repealed by the new government or Congress. There can be no difficulty in discriminating between these two classes of law. All laws which a State could consti-

tutionally enact while acting under the Constitution of the United States, will come with the class of laws which continue in force; while all other laws. such as pertain strictly to State legislation, will continue in force until modified by the new government. There can be no difficulty in discriminating between these two classes of laws.

The cases already cited also show that a provisional government, whether *civil* or *military*, is clothed with full powers of legislation. This was done in California and New Mexico. Laws were passed repealing Mexican laws, and enacting new ones, relating to the collection of duties, taxes, the administration of justice, &c. These laws thus passed by a government organized by the President alone as commander-in-chief of the military forces of the nation, were held valid and binding, until Congress interfered to change them, or to create a new government with power to do it.

The law, thus authoritatively settled, shows that the military governments organized by the President have the power of legislation within a conquered State; and if the military, then the civil governments organized by the President or Congress, and any civil government it may create, have the same power of legislation. Under this power thus authoritatively settled, the entire legislation of the conquered States may be repealed, and *hence all laws authorizing slavery.* Nor can it make any difference whether the enactment is contained in the constitution of a State, or in its statute law; since the constitution, which is its political organization, is annihilated by the conquest as a part of its political power. In the presence of a conquering authority, constitutions are of no greater sanctity than ordinary laws; it is simply a law passed with somewhat more of formality than an ordinary act of legislation, and that is all. In the case of New Mexico, General Kearney promulgated a new code, called Kearney's Code, by which all rights were regulated in that conquered territory; and these laws were laws regulating rights between individuals, and prescribing the mode and manner for the sale and acquisition of property, and the transmission of the same. These latter laws are, however, subject to repeal and alteration by the conqueror.

These cases already cited also demonstrate the right of these provisional governments, whether military or civil, whether created by the President or Congress, to perform all the functions of a legislative body. All the cases say the laws in force are subject to this right of change on the part of the conqueror; they remain in force only till the authority of the

conqueror changes them. The military governments established in California and New Mexico repealed old, and enacted new laws providing for the collection of duties and taxes, and the administration of justice, and these laws were passed by governments organized by the President alone as commander-in-chief of the army, and the Supreme Court of the United States held them all valid, and enforced them as completely and fully as the laws of any other government. The court held that these laws were passed by a legal government, and were binding until repealed by Congress as the government enacting them.

Such being the settled law in relation to territory conquered in a *foreign* war, and as the same law is to be applied to the parties to this *civil* war, it follows, necessarily, that the military, as civil governments created by the President, are clothed with the powers of legislation, and can repeal and modify *any and all laws* found in force in the conquered States. The State constitutions fall as a necessity with the State governments by the mere act of conquest and occupancy; the State constitution is a mere *law*, somewhat more formally enacted for the *political* organization of the State, and constitutes a part of that political power which is set aside by the conquest.

It is in this right of legislation vested in Congress, or in military governments organized under the war-power, that is constitutionally found *the right to abolish slavery by repealing all laws sanctioning the system, and by passing other laws prohibiting the legality of such a relation between man and man.* Slavery is an institution which exists by positive law, and these laws can be repealed; or if it exists by custom, then this custom can be pronounced illegal and criminal. There is no difference between such a law and one prescribing the rule of descent, the mode of transmitting real estate, of making contracts concerning lands, etc.; if the one can be repealed by these military governments or by Congress, so can the other be; and in support of this absolute right of legislation under such circumstances, we have the solemn decision of the Supreme Court of the United States; that question, then, is no longer an open question in this country, whatever it may be elsewhere.

These decisions also show that there is no conflict between the power of the President and Congress. The President acts upon the emergency, in the absence of any provision for the government of conquered territory by Congress, and his action, his provisional government, are at all times subject to the action of Congress. TANEY C. J. says, That the President by such

action has no power to annex territory to the United States; his power is limited to governing conquered territory, until incorporated into the Union by a treaty, or an act of Congress. 9 How. U. S. Rep. 615. These war-measures of the President cannot restore peace, cannot change the legal *status* of the conquered States in relation to the Federal Government; the treaty-making power, or Congress, can alone do this. In the case of a *civil war*, there can be no treaty unless the rebellion is a success, and the regular government is forced to such a result by an iron necessity, which knows no law. The rebel States having been declared by Congress to be in that condition, that condition must continue until Congress shall see fit to change it. The President has no power to change the status of territory as fixed by a law of Congress; if so, he could declare the rebellion at an end, and reintroduce the rebel States into the Union at any time he might see fit, and in spite of a positive act of Congress. This *civil war*, declared to exist by Congress, can only be terminated by a treaty or an act of Congress. It is like any other war,—it must be concluded by treaty or by act of Congress; the President is nowhere authorized to perform such an act.

Such being the law, the fact of the existence of a civil government, organized under the permission or orders of the President, gives these States with such a government no right to claim a representation in the Congress of the United States, or to a vote in the election of a president of the United States.

We also see that those who deny the power of the President to establish these provisional governments are in error, as well as those who claim for States so organized or governed all the rights and privileges of a State within the Union, and deny the right of Congress to settle for itself the vital question of readmission. Like all extreme opinions, both are true and both are false to a certain extent; while, however, there is an apparent, there is no real conflict in the case, and hence there ought to be union in their joint action.

We have thus endeavored to study these vexed questions upon principle and upon authority. We have endeavored to maintain the Constitution in its integrity, as expounded by our courts and approved by our fathers; and yet vindicate the legality of the acts of the President and Congress in putting down this rebellion, and in putting an end to slavery,--its primal cause. We are for the Constitution *as it is*, and the *Union as it was*. Slavery is no part of the one or the other, any more than the relation of parent and child, guardian and

ward, master and servant; each depend upon the local laws of each State, and may be altered, modified, or repealed at their will, without in any respect affecting the Constitution or the Union. Several States have abolished slavery since the Union was formed and the Constitution adopted, and yet no one ever dreamed that either was impaired or affected in the least particular by such an act. If Congress now repeals or abolishes slavery, it does it under the rights vested in it by the law and Constitution; it does it under the powers of legislation vested in it by the laws of conquest. The Hon. J. Q. Adams proclaimed this view of the law years ago, and warned the slave States of the folly and the consequences of engaging in the work of rebellion. Whatever, then, is done in this respect, is done under and by virtue of the law and Constitution; neither the one nor the other is being violated. Nor would the Union be affected in any particular if all the slave States were to abolish the institution. Are not the Union and the Constitution the same, North as well as South, without as with slavery? If the States can abolish slavery, without affecting the Constitution and the Union, cannot the President and Congress do the same thing, as, by the laws of war, the *legislative power* of these States becomes vested in them? Whatever the States as political bodies could do, the conqueror, and in this case the United States, can do.

We are, then, for the Constitution *as it is* and the Union *as it was*, unimpaired and weakened in no respect; but we are not in favor of retaining on the statute books of these States antiquated, barbarous, and anti-Christian laws, when we are vested with the constitutional power to repeal the same. We should be most unwise not to do it; nay, we should incur, and that deservedly, the execration of the Christian and civilized world, if we now failed to do our duty in this respect. The curses, too, of our posterity would rest upon this generation, if we should pass down to them this plague of slavery, which has been the prolific source of bitter controversies and sectional divisions, and, finally, of this gigantic civil war, with all its untold horrors. Let the present generation, then, do its duty, its whole duty, and nothing but its duty, in this great emergency of our national life. Let it put down this unrighteous rebellion, with slavery, its cause, and maintain unimpaired the glorious Constitution bequeathed to it by our revolutionary fathers. Then, and not till then, shall we have shown ourselves equal to the occasion, and secure to ourselves the commendation of the present and the blessings of the future.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States.

Maine District.

THE UNITED STATES *v.* MOSES MACDONALD *et al.*

Collector's Fees—Bonded Warehouses.

Collectors of ports may retain sums of money, not exceeding the amount fixed by law, received for the storage of merchandise in private bonded warehouses, under the Act of Congress of March 3, 1841, as a part of their annual compensation.

Private bonded warehouses are public storehouses within the meaning of the Act of Congress of March 3, 1841, and of all the subsequent Acts of Congress upon the same subject.

The facts in the case are fully stated in the opinion by CLIFFORD J. This is an action of debt, and the case comes before the court upon the demurrer of the plaintiffs to the rejoinder of the defendants. Declaration is drawn upon the bond of the first named defendant as collector of the customs for the district of Portland and Falmouth in this State, and the other defendants were his sureties. He was appointed collector prior to the twentieth day of January 1858, and between that day and the eighteenth day of April 1861 received, for storage of merchandise in bonded warehouses, the sum of six thousand two hundred and eighty-one dollars, as appears by his quarter-yearly account, regularly rendered to the Department. Pleadings show that the moneys so received accrued, were accounted for quarter-yearly, and were retained by the collector by virtue of his office, for storage of merchandise in bonded warehouses. Rejoinder also alleges that the moneys so received and retained by the collector in any one year did not exceed the sum of two thousand dollars, and the demurrer admits that allegation. Defendants admit the receipt of the money, but claim that the collector lawfully retained it under the Act of the third of March 1841, as part of his annual compensation. Plaintiffs deny his right

to retain the amount or any part of it, insisting that collectors cannot lawfully retain as compensation any portion of the moneys accruing from the storage of merchandise deposited in private bonded warehouses. Such is the question as frankly stated by the counsel, that both parties desire to raise in the case; and it is evident from an examination of the pleadings, that no other question of any importance is presented for decision. Unaided by former decisions, the question is one which would require an elaborate consideration, but it is not a new question, as will presently more fully appear. *U. S.* v. *Walker*, 22 How. 303. Collectors receive a prescribed sum called salary, but their principal compensation is now, and always has been, derived from certain enumerated fees, commissions, and allowances authorized by Acts of Congress. Provision for such fees, commissions, and allowances was first made by the Act of the thirty-first of July 1789, which also allowed to those officers certain proportions of fines, penalties, and forfeitures. 1 Stat. at Large, p. 64. Those regulations were not satisfactory, and new ones were enacted in their place, as appears by the Act of the eighteenth of February 1793, and by the Act entitled An Act to regulate the collection of duties on imports and tonnage, passed on the second day of March 1799, and by the Compensation Act, passed on the same day. 1 Stat. at Large, pp 316, 627, 786. By those several Acts collectors of the customs were required to keep accurate accounts of all fees and official emoluments by them received, and to transmit the accounts to the comptroller of the treasury; but the collectors were allowed to retain to their own use the whole amount of emolument derived from these sources, without any limitation. Maximum rate of compensation was first prescribed by Act of the thirtieth of April 1802, as appears by the third section of that Act. 2 Stat. at Large, p. 172. Whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than five thousand dollars, the directions and requirements of the Act were that such collectors should account for the surplus, and pay the same into the treasury of the United States. Collection districts were, by the Act of the seventh of May 1822, divided into two classes, usually denominated the enumerated and the non-enumerated ports. 3 Stat. at Large, p. 693. Emoluments of collectors for the enumerated ports, under the provisions of that Act, might reach the sum of four thousand dollars; but the ninth section of that Act provided that whenever the emoluments should exceed

that sum in any one year, the collector, after deducting the necessary expenses incident to his office, should pay the excess into the treasury for the use of the United States. Three thousand dollars is the maximum rate of compensation allowed to collectors of the non-enumerated ports, under the provisions of that Act, from all sources of emolument therein recognized and prescribed, and the tenth section of the Act contains a provision similar to that contained in the ninth section, requiring collectors of the non-enumerated ports to account for and pay over the excess beyond the amount allowed as the maximum rate of compensation. Under those provisions collectors might receive the maximum rate of their offices, if the office produced that amount, after deducting the necessary expenses incident to the office from all the sources of emolument recognized and prescribed by the then existing laws. No one could receive more than the maximum rate, and his lawful claim might be much less, according to the amount of business transacted in the office. Compensation of collectors remained without any material change from that time until the Act of the third of March 1841 was passed, which is the Act that gives rise to the principal question in this case. 5 Stat. at Large, p. 422. Every collector is required by the fifth section of that Act to include in his quarter-yearly account, among other things, all sums received by him for rent and storage of goods, wares, and merchandise stored in the public storehouses, for which a rent is paid beyond the rents paid by the collector. Supreme Court held in *U. S.* v. *Walker*, 22 How. 313, that if from such accounting the aggregate sums received from that source exceeded two thousand dollars, the collector, by the true construction of the section, was directed and required to pay the excess into the treasury as part and parcel of the public money. But the same court held that when the sums so received from that source did not in the aggregate exceed two thousand dollars, the collector might retain the whole amount to his own use, and that in no case was he obliged to pay into the treasury anything but the excess beyond the two thousand dollars. Conclusion of the court, therefore, was, and it was an unanimous conclusion, that the compensation of a collector of one of the enumerated ports may be six thousand dollars, and that the compensation of a collector of one of the other ports may be five thousand dollars, according to the state of the importations, and the amount received from rent and storage. Port of Portland is one of the non-enumerated ports. Consequently the collector

here may receive as an annual compensation for his services the sum of three thousand dollars from the sources of emolument recognized and prescribed by the Act of the seventh of May 1822, provided the office yields that amount from those sources after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto he is also entitled to whatever sum or sums he may receive for rent and storage, provided the amount does not exceed two thousand dollars, but the excess beyond that sum he is required by law to pay into the treasury as part and parcel of the public money. None of these principles are attempted to be controverted by the plaintiffs, nor can they be with any success, as they are definitively settled by the unanimous opinion of the Supreme Court. Plaintiffs admit that such is the fact, but insist that no storage as such within the meaning of the fifth section of the Act of the third of March 1841, ever accrued to the United States from dutiable merchandise warehoused in any other than the public stores mentioned in the sixth section of the Act of the fourteenth of July 1832, entitled, An Act to alter and amend the several Acts imposing duties on imports. 4 Stat. at Large, p. 591. They do not controvert the fact that the collector is charged with the custody and control of all merchandise warehoused under the laws of the United States, nor that it is his duty to demand and receive of the importer the appropriate expenses of such custody and control; but the argument is that none of the sums demanded and received for such expenses are properly denominated storage, unless the merchandise was warehoused and deposited in stores leased by the United States. According to their theory, a collector must account for all sums received for such expenses in every case under the Act of the third of March 1841, but unless the same were received on account of merchandise deposited in a public store held under lease, he must in all cases pay the whole amount into the treasury of the United States. But the construction is one that cannot be sustained. First, because if the Act of the third of March 1841 applies at all to the case, that part of it that provides for the appropriation of the money so received is as applicable to the case as that which requires the account. Secondly, because storehouses other than those owned or leased by the United States were recognized in the Act of Congress prior to the act authorizing collectors to retain to their own use all sums received for storage, not exceeding two thousand dollars in any one year. Wines and distilled spirits, under the act of the twentieth of April, 1818, might be

warehoused "in such public or other storehouses" as might be agreed upon between the importer and surveyor, or officer of inspection of the revenue for the port where the wines or spirits were landed. 3 Stat. at Large, 469. Whether deposited in the public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit in writing under the hand of the collector and naval officer of the port. Custody and control were the same, whether the merchandise was deposited in a public or other storehouse; and whether in the one or the other, the expenses of safe keeping were to be paid by the importer or his agent. Importer and the proper revenue officer might agree upon a storehouse as a place of deposit other than one owned or then held under lease by the United States; but as soon as the merchandise was deposited in the storehouse, and the locks of the inspector were affixed to the doors, it became a public storehouse for the purpose of securing the goods under the warehouse system. Suppose it be so, still it is contended by the United States that the provisions of the act of the third of March, 1841, do not apply to the bonded warehouses described in the rejoinder of the defendants, because they insist that the bonded warehouses therein mentioned were private bonded warehouses, and they contend that private bonded warehouses are not public storehouses within the meaning of that act, which in point of fact is the only question of any importance in the case. As before remarked, they concede that the act applies to public stores, and that collectors are in all cases required to account quarter-yearly, but insist that they are not authorized to retain any portion of the amount, because private bonded warehouses are not public storehouses. Instructions of the Department require collectors to account quarter-yearly for all sums received as storage, whether the merchandise was warehoused in the stores held under lease, or in bonded warehouses, or in any other storehouses authorized to be used for that purpose as the depositories of imported dutiable merchandise; and unless the Act of the third of March, 1841, authorizes that requirement, it is difficult to see on what law the instructions are based. But it is not necessary to place the decision upon that ground, because I am of the opinion that private bonded warehouses are public storehouses within the meaning of that Act, and of all the subsequent Acts of Congress upon the same subject. Entry for warehousing under the Act of the sixth of August, 1846, was required to be made in writing, in such form, and to be

supported by such proof, as should be prescribed by the Secretary of the Treasury. Deposit of the merchandise might be made in the public stores, *or in other* stores, to be agreed on by the collector or chief revenue officer of the port, and the importer, owner or consignee; but the requirement was that the collector should first take possession of the merchandise, and such other stores as were to be secured in the manner provided in the prior Act for the deposit in public warehouses of wines and distilled spirits, to which reference has already been made. Appropriate expenses were to be paid by the party making the deposit, and the whole proceedings show that the merchandise in the latter as well as in the former case is regarded as being warehoused in the public storehouses of the United States. 9 Stat. at Large, p. 53. All of the sums in controversy in the case of *U. S.* v. *Walker*, 22 How. 299, had been received under that law, and yet the distinction set up in this case never occurred to the Supreme Court. On the contrary, the court in that case expressly held that the collectors of the non-enumerated ports might receive, in addition to the three thousand dollars authorized by the Act of the seventh of May, 1822, whatever sum or sums they might receive for rent and storage, provided the amount did not exceed two thousand dollars in any one year; and directed the charges against the defendant in that case to be settled in accordance with those principles. Considered in that point of view, that case is decisive of the question under consideration. Demurrer, it should be remembered, admits whatever is well pleaded. Rejoinder not only alleges that the whole sum sued for accrued for storage between the twentieth day of January, 1858, and the eighteenth day of April, 1861, inclusive, but that the sum accrued was accounted for quarter-yearly, and retained by the collector by virtue of his office, and that the sum accrued was so accounted for and retained in sums not exceeding two thousand dollars in any one year. Taking the admission as made, then it is clear that the only practical question is, whether the bonded warehouses described in the rejoinder are public storehouses within the meaning of the provisions of the Act of the third of March, 1841, under which the same accrued, and was received, accounted for quarter-yearly, and retained. Argument upon that question is unnecessary in this court, as the question was recently presented to the court in another district of the circuit, and after full consideration was directly decided in the affirmative.—*Clark* v. *Peasley*, Mass. Dist. Oct. Term, 1862. Repetition of the reasons there given for the conclusion is unnecessary, as the opinion has been published, and is in the

hands of the parties in this case. Half storage had been demanded by the collector in that case, and the same had been paid by the merchant under protest. Having made the payment under protest, he brought suit to recover back the money, upon the ground that private bonded warehouses were not public storehouses within the meaning of the several Acts of Congress authorizing the warehousing of dutiable merchandise. Able counsel were heard in support of the proposition, but upon full consideration this court held otherwise, and gave judgment for the collector. Both parties, I believe, have acquiesced in that judgment as a correct exposition of the law of the case, and until reversed by the Supreme Court, I must adhere to that opinion. Demurrer overruled. Rejoinder adjudged good. Judgment for the defendants.

District Court of the United States.

Maine District.—In Admiralty. (July 19, 1864.)

THOMAS TRECARTIN, Libellant, *v.* SHIP ROCHAMBEAU.

A seaman may demand payment of his wages in coin, in the United States, when his service is the continuation of that rendered under a contract made in a foreign country, under which payment had to be made in coin.

The facts are fully stated in the opinion by

WARE J. Trecartin, the libellant, an American citizen at St. John, N. B., shipped on board the American ship Rochambeau for a voyage to London and back, not to exceed nine months in time, at the rate of $25 per month, in the New Brunswick currency. She made that voyage in about three and a half months: and, the time not being ended for which he shipped, the libellant continued in the vessel without signing new articles, or any new agreement as to terms, and from that port went another voyage to London, which was to terminate in the United States. The ship made her voyage to London, and from there went to the Mediterranean, visited Malta and different ports in Sicily, and returned to Portland, where she arrived and delivered a cargo of salt.

Payments were made from time to time on the voyage, at

London and in various ports in the Mediterranean. There remained due at the end of the voyage $154.38; and the only question now remaining between the parties, is whether this shall be paid in the currency of the United States, or in specie, which was the currency at St. John, where the voyage was begun.

The original contract was made in that place, and was to be satisfied in the currency of that country, which was one of specie. As the libellant continued in the ship after the expiration of this contract, without any new agreement as to terms, it would naturally follow that he continued his services on the terms fixed by the old contract, and this would ordinarily be the legal effect. It appears that the parties so understood it, for all the partial payments made from time to time, in London and various ports in the Mediterranean, were made in specie. This, if not conclusive, goes far towards putting an interpretation on the contract made by the parties. If the payments made during the voyage were made in specie, why should the balance remaining due at the end of the voyage be paid differently? The place where the original contract was made, and the continuation of the service under that contract, as no new one was made, and the price paid, all go to confirm the opinion that a specie contract was only in the contemplation of the parties. When the intention of the parties can be plainly understood, the duty of the court is to enforce the contract according to that meaning, and this is the dictate as well of the technical rules of law, as of common sense, and this rule applies with all its force to mariners' contracts, who are a plain people, and their arguments ought not to be settled on refined distinctions which they never contemplated. This view of the subject puts out of the case all the ingenious arguments of the learned counsel as to the operation of the *lex loci*, whether the wages should be according to the law of the place where the contract was made, or according to that where it terminated.

The decree in the case ought to be for a sum in the United States' currency that would make the payment equal to specie. In the daily fluctuation of the price of gold under the influence of the laws of the country and the commercial speculation, it is difficult to say what that sum should be; but I have come to the conclusion that it is double the amount admitted to be due, of $154; and make it $308, it will be as near right as I can make it. Decree, $308 and costs.

New York District.

In Rem.—June, 1864.

The United States *v.* The Schooner George Darby and her Cargo.[1]

A vessel has not proceeded or departed on her voyage, within the provisions of Acts of Congress of July 13, 1861, and May 13, 1862, and the rules and regulations of the Secretary of the Treasury supplementary thereto, until she is outside the limits of the harbor of her port of departure.

The facts are fully stated in the opinion by

Betts J. The collector of the port, on Sept. 26, 1863, seized the above vessel and cargo, anchored in the harbor, having commenced to depart from this port, destined on a voyage to Beaufort, N. C. The next day a libel of information was filed against the vessel and cargo in the cause, demanding the forfeiture of the vessel and cargo, and their condemnation to the use of the United States, because of the violation of the Acts of Congress of July 13, 1861, and May 12, 1862 (12 Stat. at L. 257 and 404), and the proclamations of the President of Aug. 16, 1861, and May 2, 1862, and the rules and regulations of the Secretary of the Treasury of May 12, 16 and 23, and of Aug. 28, 1862.

The Atlantic Navigation Company, a corporation established by the laws of the State of New York, intervened by their Secretary and filed their answer and claim to the suit against the vessel, Oct. 1, 1862, claiming to be her true and *bona fide* owners, and taking an issue of general denial to all the charges inculpating the vessel in the matters alleged against her, the owners of the vessel not being owners of or claiming any interest in the cargo.

Various parties, asserting interests in the property and merchandise laden on board, also intervened and filed claims and answers in full defence of the action implicating the cargo seized with the vessel.

The various issues were brought before the court for hearing in the December term of 1863, and were proceeded with for the prosecution and defence during five successive days, fully occupied in giving parol and documentary evidence, and in sub-

[1] From the New York Daily Transcript.

mitting oral arguments thereon, the counsel for the respective parties reserving the privilege also of supplying further explanations and discussions upon the entire controversy by written briefs and arguments. The last of these papers were delivered to the court during the March and April terms of the present year. On the final submission of the case, however, it was agreed between the parties that the decision of the court should be limited to the issue with the vessel alone, without affecting the claimants of the cargo or of the government in that branch of the suit affecting the cargo, the counsel for those claimants withdrawing themselves, with the consent of the United States attorney, from taking part in the issue in respect to the culpability of the vessel.

There seems to be no ground of controversy upon the proofs that the claimants of the vessel were, at the time the voyage was undertaken, *bona fide* owners of the vessel; that the port of Beaufort, in the State of North Carolina, though territorially within the enemy's country, was, under the statutes and regulations, in force in this respect, open and free to the lawful commerce of the United States in vessels duly cleared and licensed in the United States; that this vessel had been in proper form cleared and licensed at the custom-house at this port for the voyage intended to be made at the time hence to that port, and that the cargo discovered upon the vessel, and alleged to be contraband of war and unlawfully placed there, was laden on board without the actual knowledge of or notice to the claimants or their agents of any illegal or irregular act on the part of the vessel in respect thereto, other than what the clearance and permit granted the vessel at the custom-house at this port, previous to her effort to leave the port on her intended voyage, may have imported in contemplation of law.

The gravamen of the charges against the vessel was, first, that she was carrying as part of her lading articles contraband of war; and secondly, that she was proceeding from this port to Beaufort, in violation of the provisions of the statute before referred to, as supplemented by the regulations of the Treasury Department, which are coöperating with the said statutes as an entire enactment.

The gist of the defence, except in the particular of fact, that the voyage complained of had not actually been entered upon and commenced when the vessel and cargo were seized, rests upon the proposition of law set up by the claimants, that the acts alleged to have been committed by the vessel were not unlawful, within any provision of the existing law.

A succinct and connected statement of the terms of the Acts of July 13, 1861, and May 12, 1862, together with the regulations appointed by the Secretary of the Treasury, will exhibit a satisfactory exposition of the purport of the enactments governing the subject in question.

The Act of July 13, 1861, section 5, enacts that all commercial intercourse by and between the inhabitants of any State in a state of insurrection and those of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue, and all goods and merchandise coming from said States into the others by land or water, and all proceeding to the same, together with the vessel or vehicle conveying the same, shall be forfeited to the United States.

The Act of May 20, 1862, authorizes regulations to be adopted by the Secretary of the Treasury with respect to the transportation of goods from any foreign or domestic port for the use of the insurgents, those regulations having the same sanction and force as statutory enactments.

The rules and regulations prescribed by the Secretary of the Treasury, admitted by the counsel for the claimants on the trial to be legally authenticated, were issued by the Department in May and August, 1862, and are made in the libel of information substantive grounds of charge against the vessel in this suit. The true import of the Act of May 20, 1862, is to empower the Secretary of the Treasury to apply by his regulations conditions to the trade to be after permitted with insurrectionary ports, of the same efficiency as if imposed by direct legislation of Congress. And, accordingly, violations of the rules restrictive of such trade are subject to like penalties as if the regulation was one of direct and positive legislation.

But the overt acts, made criminal by the acts of Congress referred to in the libel of information in the cause, are those of actual trading or intercourse with the ports or citizens and inhabitants of insurrectionary places, or the proceeding or departure of vessels to carry into effect such intercourse or trading. The libel nowhere alleges that the purpose and intention to carry on commercial intercourse at Beaufort, or with the rebels, or to supply them with articles contraband of war, in the contemplated voyage, subject the vessel to condemnation and forfeiture.

The libel does not aver the purpose and intention *per se* of the owners of the vessel to prosecute an unlawful commercial intercourse with the enemy, or supply them with articles contraband of war, to be a criminal offence, subjecting the vessel to forfei-

ture. The allegations are, that the ship is now at the port of New York, and was there seized as forfeited to the United Sates, "for proceeding to a State declared to be in insurrection against the United States, in violation of the Acts of Congress and regulations of the Secretary of the Treasury," &c., &c.

If the preparation of the vessel for the voyage she purposed performing was in violation of the regulations of the Secretary of the Treasury, or the provisions of the Act of Congress, it is not made by the libel the gravamen of the offence alleged to have been committed by her. The libel charges that "the said George Darby and cargo are forfeited to the United States for proceeding to a State," &c.

The vessel was seized and detained in the harbor immediately after leaving her dock, and in the open body of the harbor. The blow was struck when the criminal act was under premeditation and fully resolved upon, perhaps, mentally by the accused party, so that the guilty deed was morally accomplished; but it yet lacked that physical perpetration necessary to constitute the *derelictum* which only is cognizable by civil law. The government detectives, who sedulously supervised in secret the outfitting of the vessel in this port, and watched every step in her preparation, were obviously cautioned that she could not be interfered with whilst moored in the harbor, and waited until she cast off from her dock to arrest her in the act of violating the law "in proceeding" from this port to Beaufort. The arrest of the vessel was virtually concomitant with her casting off from her moorings, as the seizing officers went immediately on board her, and she was brought to anchor immediately by their orders, and prevented from departing from this port or "proceeding" upon such undertaking.

The propositions of fact insisted on by the libellants are, in substance, that the liquors taken on board the vessel were contraband of war, and that permits and licenses therefor were fraudulently and evasively obtained at the custom-house, so as to make the clearances and permits therefor legally void; and that the vessel was seized proceeding on a voyage from this port to Beaufort, with a view to commercial intercourse there, in violation of the Act of Congress referred to, she not having obtained a lawful permit therefor.

The claimants contest these positions of fact and law, denying that the vessel, when arrested, was proceeding on the voyage alleged, or that she was lawfully seizable in this port on the allegations contained in the libel; that the cordial laden on board her was contraband of war, or that the ship was responsible for

the liquor admitted on board under the permit of the custom-house, and insisting that neither the law nor the regulations of the Treasury Department make the vessel responsible for the liquors found on board of her.

I think the decision of the Supreme Court in the case of the sloop Active (7 Cranch, 100), establishes the principle that the action of the schooner in this case, at anchor or in motion within the harbor, under way, with a view of pursuing a voyage to Beaufort, was not a proceeding or departure within the interdiction of the law, and does not authorize her arrest in this case. The vessel was not, in judgment of law, proceeding to the port of Beaufort in violation of law, until she had gone out of the port of New York. There had accordingly no right of action accrued in the case when the vessel was attached by warrant, and the libel must be dismissed.

For the United States, District Attorney Smith and Mr. Lowrey; for the vessel, Messrs. Webster and Craig.

Supreme Court of Massachusetts.

Citizens' Mutual Fire Insurance Company *v.* Daniel R. Sortwell and Others.

A by-law of an insurance company, which provides that a special meeting shall be called by the president, or, in his absence, by the secretary, on application made to them in writing by ten members, does not preclude the directors from calling special meetings without such application.

One who becomes a member of a mutual insurance company, after it has practically adopted the provisions of St. 1849. c. 104, § 2, authorizing the property insured to be divided into classes, and acted thereon for several years, cannot object, in an action to recover an assessment upon his deposit note, that the same were not formally adopted at a meeting regularly called for that purpose.

If the records of a corporation show that a meeting was duly called and proper notice given, and that business was transacted at it, the presumption is that a quorum of members was present, unless the contrary clearly appears.

The directors of a mutual insurance company may divide the property insured by them into classes, under St. 1849, c. 104, § 2, from time to time, as the policies are issued; and, after the full amount of one hundred thousand dollars is subscribed to be insured in each class, the policies will take effect, and one who becomes insured thereafter cannot object, in an action to recover an assessment upon his deposit note, that the proceedings were irregular.

Subscriptions for insurance in a particular class of risks of a mutual insurance company, which are made a short time before the adoption by the company of the provisions of St. 1849, c. 104, § 2, may, in an action to recover an assessment upon a deposit note of a subsequent member, after the lapse of ten years, without objection from the company or the persons insured, be

taken as a part of the sum required by that statute to be subscribed before the issuing of policies.

A statement in the instructions issued by the directors of a mutual insurance company to agents, that distilleries are not insurable, does not preclude the company from making a valid contract of insurance upon a distillery.

Contract brought by a mutual insurance company to recover an assessment of fifty-five dollars upon a deposit note executed to them by the defendants on a policy upon a distillery insured in the company's second class. The answer alleged that the property insured by the plaintiffs had never been legally divided into two classes, and that no second class had ever been legally established, and that the assessment was unequal and illegal, and denied that the defendants were legally insured in that class.

At the trial in the Superior Court, without a jury, it appeared that the plaintiffs accepted their charter on the 1st of October, 1846, and at the annual meeting on the 9th of January, 1849, and at meetings of the directors held thereafter, votes were passed looking to a division of the property to be insured by the company into two classes; and at a director's meeting held on the 5th of June, 1849, it was voted that the secretary be requested to call a meeting of the policy holders, to be held on the 2d of July, to consider the subject of accepting St. 1849, c. 104, concerning mutual fire insurance companies, and that said notice be given by publishing notice of the same, agreeably to the rules of the corporation. The meeting was accordingly called, notified, and held, and the record thereof showed that there were twenty-three policies represented; and a committee was chosen to ascertain the necessity of accepting said legislative act, and the meeting was adjourned to the 7th of August. At the adjourned meeting, the record showed that twenty-four policies were represented; and the report of the committee having been made, it was voted to accept the statute. And at various meetings of the directors, held thereafter, votes were passed recognizing a practical division of the property insured by the company into two classes.

The 19th article of the by-laws of the company provided that fifteen members being present at a meeting, either personally or by proxy, should constitute a quorum for doing business; and Article 20 contained the following provision: "A special meeting shall be called by the president, or, in his absence, by the secretary, on application made to them in writing by ten members."

Stephen W. Trowbridge testified that he was secretary and

treasurer of the company; that it appeared from the books of the company that, on August 2d, 1849, there was subscribed to be insured in the second class in said company the sum of $453,000, or thereabouts; and that, between that time and October 1st, 1849, $100,000 additional was subscribed; that the directors began to issue policies in the second class after the vote of the annual meeting of the company in January, 1849, and that the $453,000 consisted of policies issued as in the second class on or before August 2d, 1849, which, with new subscriptions, as they came in, constituted that class after the acceptance of St. of 1849, c. 104. It also appeared that, after January, 1849, a set of books was opened for the second class; that the business of the two classes had ever since been kept distinct; that policies were issued on and after August 7th, 1849, without interruption, in the two classes; that the annual returns required by law had been made for both classes since 1849, and that the annual report of the treasurer and auditing committee contained a separate account for each class.

The defendants' application was put in, and bore date June 20th, 1860, in which they request insurance in said company; and, upon said application, a policy was issued and accepted by them, approved June 22d, by which the plaintiffs insure the defendants, in their second class, against loss or damage by fire in the sum of $2,000, on the "stock in trade of a rum distillery, contained in wood and brick building," in Somerville. The act of incorporation and by-laws of the company are printed on the policy. The signature to the note was admitted.

A monthly committee of two directors was regularly chosen, who passed upon all applications for insurance, and approved the issuing of policies, and allotted applicants in the first or second class, and whose doings were reported at the monthly meeting of the directors, and by them approved. The method of the assessment and computation was not gone into in this case.

Parol evidence was offered that from October 7th, 1849, all the acts of the directors, both as to the taking of risks and their division into classes, payment of losses and of dividends, and laying of assessments, have been conducted strictly with reference to a classification of risks into two classes.

The judge ruled that, upon the evidence presented, the company had not proved a legal division of risks into two classes by the directors, and that the assessment was therefore illegal, because not laid upon all the members of the company, and ordered judgment to be entered for the defendants. The plaintiffs alleged exceptions.

B. R. Curtis and W. Baldwin for the plaintiffs. 1. The special meeting was duly called. *Sargent* v. *Webster*, 13 Met. 497; *Comth.* v. *Woelper*, 3 S. & R. 29; *McDaniels* v. *Flower Brook Co.*, 22 Verm. 274; *Clarke* v. *Imperial Gas Co.*, 4 B. & Ad. 315; *Great North of England Railway* v. *Biddulph*, 7 M. & W. 243. 2. If not, it is not for the defendants to object. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94. 3. The presumption is that a quorum was present. *Williams* v. *Cheney*, 3 Gray, 220. 4. No formal vote dividing the risks into classes was necessary. The action of the directors was sufficient. *Lexington and West Cambridge Railroad* v. *Chandler*, 13 Met. 311; *London Tobacco Pipe Co.* v. *Woodruff*, 7 B. & C. 842; *Great North of England Railway* v. *Biddulph*, 7 M. & W. 243. 5. The defendants cannot object to informalities happening so long ago, which do not appear to have produced any appreciable effect upon their rights. Redfield on Railways (2d ed.), 86, and cases cited; *Chester Glass Co.* v. *Dewey*, 16 Mass. 94; *Long Pond Ins. Co.* v. *Houghton*, 6 Gray, 77; *New England Ins. Co.* v. *Belknap*, 9 Cush. 140. 6. The policies issued by the company were valid, whether the required sum had been subscribed or not. *The Magdalena Steam Nav. Co.*, 6 Jur. (N. S.), 975; *County Commissioners* v. *Aspinwall*, 21 How. (U. S.), 545; *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327. 7. Certainly the defendant cannot make the objection. *Deposit Life Ins. Co.* v. *Ayscough*, 6 El. & Bl. 761; *Hull Flax Co.* v. *Wellesley*, 6 Hurlst. & Norm. 38; *Wolverhampton New Water Works Co.* v. *Hawksford*, 7 C. B. (N. S.), 795. 8. The prohibition to the agents to take distilleries does not affect this risk, taken by the company.

J. S. Holmes and C. S. Lincoln for the defendants. 1. The special meeting was not duly called. *Brewer* v. *Chelsea Ins. Co.*, 14 Gray, 203; *Hale* v. *Mechanics' Ins. Co.*, 6 Gray, 169; *Atlantic Ins. Co.* v. *Fitzpatrick*, 2 Gray, 279; *Wiggin* v. *Baptist Church in Lowell*, 8 Met. 301. 2. It does not appear that a quorum was present. 3. There was no division of the property insured into two classes, after the alleged acceptance of the statute. *People's Ins. Co.* v. *Arthur*, 7 Gray, 267. 4. The requisite amount was not subscribed to authorize the company to insure in a second class. St. 1849, c. 104, § 2. 5. The property of the defendants was of a class which the company had voted not to insure, and the defendants' policy was therefore invalid. *Mulrey* v. *Shawmut Ins. Co.*, 4 Allen, 116.

Bigelow C. J. The amount involved in the decision of

this case is quite disproportionate to the importance of the questions, on the determination of which the right of the plaintiffs to recover depends. If some of the objections urged by the defendants against the validity of the assessments imposed on them are well taken, the result will be, not only that this action must fail, but the conclusions will follow that the plaintiffs have been carrying on the business of insurance for thirteen or fourteen years on an illegal basis, and issuing policies in a manner not authorized by law. It will also follow that many of their deposit notes are illegal and void. To understand fully the nature of the main objections raised by the defendant, it is necessary to premise that, in the year 1849, by a statute of that year, c. 104, the legislature authorized mutual fire insurance companies then existing to divide the property which they might thereafter insure into two distinct and separate classes, the division of risks to be made according as the risk assumed might be deemed to belong to a greater or less hazardous description of property. The statute required that, when such a classification was made, each policy should designate the class to which it belonged, and that the premiums and deposits received in each class should be kept separate and distinct, and held liable to meet only those losses which might occur in the class to which they belonged. It was also required that these provisions should not take effect, in reference to any company, until they should be adopted at a meeting of the corporation called for the purpose; and that no policy should be issued, to cover property in any separate class, until the amount of one hundred thousand dollars should be insured in such class. On the 22d day of June, 1860, the plaintiffs issued a policy to the defendant, purporting to insure certain property belonging to him in "the second class," and received from him a deposit note for the sum of eighty dollars, on which they have proceeded to lay an assessment, to recover which this action is brought. The defendant insists that this note is not binding on him, and that he is not liable to pay the assessment laid upon it, because the proceedings of the plaintiffs have been irregular and illegal in several particulars, and the policy issued by them to him, as well as the premium note given in consideration thereof, are without validity or legal force.

1. The first and leading objection is, that the plaintiffs were not authorized by law to make a policy in the second class, because the St. of 1849, c. 104, authorizing a division of property insured into two classes, was never legally accepted by the plaintiffs. This objection is put on two grounds. The

first is, that the meeting of the corporation, at which the alleged acceptance of the act took place, was not duly called, for the reason that, being a special meeting, it could be legally assembled only in the manner prescribed by the twentieth by-law of the company, on the application of ten members. But this objection proceeds on a misconstruction of the terms of the by-law, and the purpose it was intended to answer. It is not prohibitory, but only mandatory. It provides a method in which the members of the company can require the officers to call special meetings. But it does not, in terms or by implication, restrain the directors from calling them at other times without such application, whenever, in their judgment, it may be expedient or necessary so to do. Certainly any such restrictions over the authority of the directors would be unreasonable, and could be created, if at all, only by the most clear and explicit language. By Rev. Sts. c. 37, § 25, directors of mutual insurance companies are expressly authorized "to manage and conduct all the business thereof." Under the authority thus granted, there can be no doubt that legal power was vested in the directors of the plaintiffs' corporation to call special meetings. It is equally clear that this power was neither abridged nor taken away by the operation of the by-law on which the defendants rely, and that it was well and legally exercised in calling the meeting at which the provisions of St. 1849, c. 104, were accepted by the plaintiffs. An equally decisive answer to this ground of defence is, that the objection to the mode of calling the meeting in question, even if well founded, is not open to the defendants. The provision of the statute authorizing a division of risks was, in fact, accepted by the corporation, and they had proceeded to act under it, and had carried on business in conformity to its enactments, for ten years before the defendant became a member of the corporation by accepting a policy of insurance. Under these circumstances he cannot now object to any informality in their previous proceedings. By coming in, after a practical acceptance of the act for so long a period, he waived all technical defects and irregularities. He stands in no better position than a stockholder of a corporation, who is estopped from raising any objection to the legal organization of the company after they have proceeded under an actual organization, and transacted business for several years. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94, 101.

The other objection to the legality of the meeting is, that a quorum of members of the company, according to the requi-

sition of the nineteenth by-law, was not present at the time the act was accepted. It is true that the record does not show affirmatively that fifteen members of the company were present at the meeting. Nor is it necessary that it should. The contrary does not appear. It is sufficient that the record shows that the meeting was duly called, and proper notice of it seasonably given. The law will assume, in the absence of evidence, that a proper number were present to transact the business for which the meeting was called. Illegality will not be presumed, but the contrary. The maxim of law in such cases is,—"Omnia rite acta presumuntur." *Sargent* v. *Webster*, 13 Met. 504.

2. It is next objected that there was no actual division of the property insured into two distinct classes, as required by the statute, after its provisions had been accepted by the plaintiffs. But we do not think this objection is supported by the facts which are disclosed in these exceptions. Without taking into account policies which were issued prior to August 2d, 1849, purporting to be in the second class, it appears by the evidence of the secretary of the company that, between the last named date and the 1st day of October following, the sum of one hundred thousand dollars was subscribed to be insured in the second class, and policies duly issued therefor. This, we think, was a practical division of the risks, in pursuance of the provisions of the statute. Nor do we see how any other divisions of risks could conveniently be made. After the act was accepted, the company had full power to divide the risks. How could this power be exercised? Certainly it was not necessary to wait until the requisite sum was subscribed, before making a division of the risks. Such a mode of carrying into effect the provisions of the statute would be hardly practicable. The only reasonable mode of making the division would be by classifying the risk when it was offered and assumed by the company. That was the time when the nature and situation of the property would be examined and considered, with a view to ascertain the expediency of taking the risk, and the premium at which it would be safe and proper to insure it; and, as necessarily incident to this, would be the determination of the question into which of the two classes or divisions the risk would fall. The division, therefore, would be appropriately and properly made, day by day, as each risk was approved. Such was the course adopted by the plaintiffs. A set of books was opened, in which the second class of risks were entered; the accounts of the two classes were kept separate and distinct,

and the business of the company conducted on the basis of a division of the risks according to the statute.

Whenever, therefore, the requisite amount of one hundred thousand dollars of property, to be insured in the second class, was subscribed and assumed by the company, the division of risks became complete, and the authority of the corporation to issue policies designated as belonging to the two classes was plenary. The only irregularity was in issuing policies thus designated before the full amount was subscribed in the second class, as required by statute. But this, we think, is quite immaterial. Inasmuch as the requisite amount was obtained within a brief period after the acceptance of the act, and as all the policies in the second class issued after the 2d day of August, 1849, must have been granted by the company and received by the parties insured in contemplation of this contingency, that the necessary amount issued be subscribed in this class, and on the implied condition that the statute in this particular would be complied with, we can see no good reason to doubt their legality, nor any sufficient ground for maintaining that the provision of the statute was not substantially fulfilled; especially as it does not appear that the parties to the contracts of insurance—the plaintiffs on the one hand, or the assured on the other,—have ever called in question their validity. Nor is this all. It affirmatively appears that the corporation have recognized all the policies issued between August 2d, 1849, and the 1st of October following, as valid contracts in the second class, and have fully ratified and affirmed them by including them in their annual returns, and in the reports of their treasurer and auditing committee, as constituting risks of this description duly classified under the statute.

3. The same considerations are applicable to the further objection, that it does not appear that the sum of one hundred thousand dollars was subscribed to be insured in the second class after the acceptance of the act. If the fact be so, which does not distinctly appear by the exceptions, it is shown that this sum was subscribed between the 2d day of August, five days before the vote accepting the act was passed, and the 1st of October following. The subscriptions which preceded the vote may fairly be presumed to have been made in contemplation of the immediate acceptance of the act by the company, and they have since been fully ratified and confirmed by the acts of the plaintiffs, and are not shown to have been disapproved by the assured.

These are all the objections urged by the defendants, based on irregularities or informalities in the action of the corporation in accepting the statute authorizing a division of risks into classes, and in making such division in conformity to the requirements of law. The answers we have already given to them seem to us to be decisive, and to dispose of the grounds of defence on these points. We doubt very much, however, whether the defendants are in a position to be heard in alleging such defects as a ground of resisting the plaintiffs' claim on the note in suit. The defects and technical errors on which he relies, if originally well founded, and not subsequently cured, occurred many years ago, before the defendant became a member of the corporation; and all the contracts of insurance which were made at that time, and which might have been injuriously affected by the irregular action of the corporation, have long since terminated. Nor is it shown that the rights of the defendants—members of the corporation, and holders of a policy—have been practically affected, in an appreciable degree, by these alleged errors and informalities. Under such circumstances, a party cannot be permitted to set aside his contract, unless he is able to show that its enforcement would clearly violate the settled rules of law. It is also open to question whether, under any circumstances, some of the objections relied on by the defendants would constitute any defence to this action. See *County Commissioners* v. *Aspinwall*, 21 How. (U. S.), 545; *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327. This case, however, does not require us to express a definitive opinion on these points.

5. Another objection to the maintenance of this action, of a different character, is suggested by the defendant. It is said the contract of insurance is invalid, because the risk assumed is of a class which the company had voted not to insure. There is no evidence which supports this objection. It only appears that the directors had instructed their agents not to take risks of the kind covered by the policy issued to the defendant. But it is not shown that the directors or other officers of the corporation were prohibited or restrained, either by a by-law or vote, from issuing policies on property of such description.

Exceptions sustained.

Supreme Court of New Hampshire.

GRIFFIN *v.* SANBORNTON.

The injury occasioned to an individual by being deprived of the use of a highway, in consequence of its being totally blocked up with snow, is not special damage within the meaning of the statute; and no action therefor can be maintained against the town.

Case for special damages caused by defects in a highway in Sanbornton. The declaration alleged that the highway was impassable from January 1, 1861, to February 10 of the same year, by reason of being filled and incumbered with great drifts of snow, whereby the plaintiff was greatly injured in his business, and damaged in his attempts to drive an ox-team over the road, and prevented from fulfilling his engagements with divers persons at Sanbornton Bridge, to draw and supply them with fire-wood.

At the trial upon the general issue the plaintiff offered to prove that said road, during all that period, was totally blocked up with snow-drifts, and impassable; and that he was then living in Sanbornton at one end of it, and had occasion to use it for hauling wood to divers persons at Sanbornton Bridge, whom he had agreed to supply, but was unable to do so by reason of great obstructions; and also had during all that time occasion to use the road to go to the post-office and other places of business at said Sanbornton Bridge, but was unable to do so for the reason aforesaid; and that he sustained large damages in consequence of being so deprived of the use of said way, and his inability to perform his engagements as aforesaid.

To the sufficiency of this evidence to maintain the action the defendants excepted, and thereupon it was agreed to submit the question of its sufficiency to the court, with the provision that if found insufficient a nonsuit shall be entered, and if sustained the case shall be discharged and the action tried by the jury.

Lyford and *Blair* for the plaintiff.

1. The evidence offered is sufficient to maintain the plaintiff's action. If this action cannot be sustained the plaintiff is without remedy. An indictment affords no remedy for the damage sustained by the plaintiff. *Farnum* v. *Concord*, 2 N.H. 392.

2. The plaintiff could not prudently or safely have driven his oxen or his horse into the drifted snow when he saw the danger. He was not authorized to do so at the expense of the town. *Farnum* v. *Concord*, 2 N. H. 392.

3. The town were bound by statute to break the road, and keep it in condition to be used. Comp. Stat. 150, secs. 1, 7.

4. It was not necessary to the maintenance of this action that the plaintiff should have broken his sled, killed or wounded his oxen or his horse, or sustained any bodily injury himself.

I. A. Eastman for the defendants.

1. This action cannot be maintained at common law. *Farnum* v. *Concord*, 2 N. H. 392; *Brady* v. *Lowell*, 3 Cush. 124; *Mower* v. *Leicester*, 9 Mass. 250; *Riddle* v. *Locks & Canals*, 7 Mass. 164; *Eastman* v. *Meredith*, 36 N. H. 298, 299; 2 Kent Com. 274; Angell & Ames on Corp., sec. 629; *Harwood* v. *Lowell*, 4 Cush. 312; *Hixon* v. *Lowell*, 13 Gray, 64. The case of *Wheeler* v. *Troy*, 20 N. H. 77, is probably misreported, and is not law. *Eastman* v. *Meredith*, 36 N. H. 299, 300.

2. The injuries stated to have been received by the plaintiff are not those for which an action will lie upon the statute. The damages recoverable are those which are sustained in using the road; such as are direct and not consequential; those which arise from being unable to use the road, being common to the public generally, are properly redressed only by a public prosecution. Coke Litt. 56, a; *Paine* v. *Patrick*, Carth. 194; Burr N. P. 26; *Holmes* v. *Townsend*, 13 Met. 297; *Brailey* v. *Southborough*, 6 Cush. 141; *Weeks* v. *Shirley*, 33 Me. 271; *Baxter* v. *Winooski Turnpike Co.*, 22 Vt. 114; *Hull* v. *Richmond*, 2 Wood. & Minot, 337; *Ball* v. *Winchester*, 32 N. H. 435, 444; *Tisdale* v. *Norton*, 8 Met. 388; *Harwood* v. *Lowell*, 4 Cush. 313.

Bellows J. The evidense offered goes to show a total obstruction of the highway, in consequence of which the plaintiff was wholly unable to use it, as he had occasion to do, for hauling wood to market, and for other purposes, by reason of which he lost the sale of such wood, and was unable to perform his engagements. But it does not appear that he actually attempted so to use the road, or that, while passing over it, he was injured.

Upon this state of the evidence we do not think the action can be maintained, because it is not a case of special damage under our statute; and unless it is, no action can be main-

tained against the town. *Farnum* v. *Concord*, 2 N. H. 392: *Eastman* v. *Meredith*, 36 N. H. 284. In *Ball* v. *Winchester*, 32 N. H. 435, 444, it is laid down that the damages for which a private person may maintain a suit against a town, are limited to such as happen in the use of the highway, as such, and which are the direct, and not consequential, results of the defect complained of, and also limited to injuries caused to the person, team, or carriage of the traveller.

The case of *Farnum* v. *Concord*, relied upon by the plaintiff's counsel, also holds that the town is liable only for injuries directly caused by the defect; and puts the case of a traveller, who, on finding a bridge impassable, loses his horse in an attempt to ford the stream. In such a case it is said the town would not be liable, because the damage was not caused directly from the defect in the bridge, but from danger in fording the stream. It is true, it is said, that if the traveller, on approaching such a bridge, found it impassable, he might decline to pass it; and if he sustained any special damage by reason of being unable to pass it, he might well maintain an action against the town; but what would constitute such special damages is not distinctly stated, although, as we have seen, it would not include those resulting from consequential injuries. That the court could not have meant such damages as are shown in the case now before us, appears by its recognition of the doctrine of *Paine* v. *Patrick*, Carth. 191, where it was held that a suit could not be maintained by a private person for not keeping a ferry-boat, whereby he lost his passage.

The doctrine of *Ball* v. *Winchester* is fully sustained by numerous American cases, under statutes similar to our own. *Holman* v. *Townsend*, 13 Met. 297; *Tisdale* v. *Norton*, 8 Met. 388; *Harwood* v. *City of Lowell*, 4 Cush. 310; *Brailey* v. *Southborough*, 6 Cush. 141. In these cases it is distinctly held that to make the town liable for injuries to an individual, the defect in the highway must be the direct and proximate cause; and that the recovery will be limited to injuries to the person, teams, carriages, or other goods or chattels of the plaintiff, and that no action can be maintained for damages occasioned by not being able to use a highway; inasmuch as that is common to all, and is properly the subject of a public prosecution. The same doctrine is held in *Baxter* v. *Winooski Turnpike Co.*, 22 Vt. 114; *Weeks* v. *Shirley*, 33 Me. 271; *State* v. *Hewitt*, 31 Me. 396, 400.

The general doctrine in England is that a suit by an individ-

ual will not lie for a common nuisance in a highway, unless he has sustained a particular damage; because, it is said, if one man might sue, every one might do the same; whereas a suitable remedy by presentment is provided for such cases; and the principle applies equally to the case of a nuisance caused by an individual as by a town or parish. *Williams' Case*, 5 Co. 72, and notes; Co. L. 56, a; *Winchester* v. *Lethbridge*, Willes 71, cases cited, and note; *Fineux* v. *Harraden*, Cro. Eliz. 664; which was an action on the case for digging a ditch across a way, whereby the plaintiff lost his passage; and it was held that the action would not lie. In *Paine* v. *Partrich*, Carth. 191, it is said by HOLT C. J. that "if a highway is so stopped that a man is delayed in his journey a little while, and by reason thereof is damnified, or some important affair neglected, this is not such a special damage for which an action on the case will lie." So it was held in *Hubert* v. *Graves*, 1 Esp. 148, where the way was so totally obstructed that the plaintiff was wholly deprived of the use of it, and obliged to carry his coals, timber, etc., by a circuitous and inconvenient way. So is Com. Dig., Action upon the Case for a Nuisance, C, where it is laid down that if a man dig a ditch in a highway, whereby A cannot use it, an action does not lie; and so if, by stopping the highway, a man is constrained to use a longer and more difficult way; or the sale of his coals in an adjacent colliery is hindered.

The same general principle is recognized in *Rose* v. *Miles*, 4 M. & S. 101; but it was held that when the defendant had moored a boat across a navigable creek, and compelled the plaintiff, when he reached the place with his own loaded barge, to unlade it and transport the goods by land, an action would lie; Lord ELLENBOROUGH C. J. saying that the plaintiff was in the occupation of the navigation, had commenced his course upon it, and was in the act of using it when obstructed; that it did not rest merely in contemplation, but went one step farther. See also *Stetson* v. *Faxon*, 19 Pick. 147, and cases reviewed.

It will be perceived that in most of the English cases the suits were against private individuals, whose liability did not depend upon statute; whereas towns with us are liable for injuries caused by defects in highways, only by statute, and the extent of that liability must depend upon the construction given to that statute; and, being of the opinion that it does not provide for such a case as the present,

The plaintiff must be nonsuit.

RECENT ENGLISH CASE.

Queen's Bench.—June 13, 22.

CHAMBERS *v.* THE MANCHESTER AND MILFORD RAILWAY COMPANY.

Railway company—"Lloyd's" bonds—Borrowing powers—7 and 8 Vict. c. 85, § 19—Companies Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 16), section 38.

The 7 & 8 Vict. c. 85, § 19, after reciting that railway companies have been in the habit of borrowing in a manner unauthorized by their acts of incorporation or other Acts of Parliament, upon loan notes and other securities, and that such loan notes and other securities were of no legal validity, provides that any railway company issuing any loan note or any negotiable or assignable instrument, purporting to bind the company as a legal security for money advanced, otherwise than under the provisions of some Act or Acts of Parliament authorizing such railway company to raise such money and issue such security, shall forfeit to her Majesty a sum therein mentioned.

Held, that this section, when regarded in connection with the whole scope of legislation as to railway companies, forbids them to borrow money, except in the manner expressly authorized by Act of Parliament.

Where, therefore, a railway company, who were empowered by their special act of incorporation to borrow "on mortgage of their undertaking," upon certain conditions, and subject to certain restrictions, issued six "Lloyd's" bonds to facilitate a loan which had become necessary for the purposes of the undertaking, it was held that the holder of such bonds could not recover against the company, who had acted *ultra vires* in issuing them for borrowing purposes.

Semble, a "Lloyd's" bond may be legitimately issued to a person to whom the company is already indebted, although not to a person about to advance them money.

This was an action tried before ERLE C. J., at the last Kingston assizes. The plaintiff's claim was for £150, being six months' interest at £5 per cent. per annum on six bonds of the defendants of £1,000 each, dated respectively the 28th of May, 1863. A verdict was found for the plaintiff for the above amount, with leave reserved to the defendants to move to enter a nonsuit, on the ground that the company had no legal authority to issue the securities on which the action was brought, nor to borrow money on such securities; and that the plaintiff, having knowledge of the facts, could not recover upon the bonds.

The facts of the case are shortly as follows:—

The defendants were a company formed in 1860, under a special Act of Parliament, the 23 & 24 Vict. c. 75. The plaintiff was the chairman of the company. Of the nominal capital of £550,000, only £12,000 was subscribed. Various expenses having been incurred, and money difficulties having consequently arisen, the directors, at a meeting presided over by the plaintiff, held on 5th January, 1861, resolved to apply to the Union Bank for the loan of £10,000. The bank agreed to advance that amount on the security of the promissory note of the directors, and on March 7th it was resolved that the plaintiff and another director, named Barrow, should sign the necessary notes on behalf of the company, "on condition that the proceeds of the calls made on the shareholders be first applied in liquidation of the sum of £10,000." The plaintiff and Mr. Barrow accordingly joined in a promissory note for £9,500. In May, 1863, the bank applied for repayment of their advance, and Mr. Barrow repaid them the whole. He then sued the plaintiff for contribution, who in his turn applied to the company to assist him to meet the demand made upon him; and on May 26th a resolution was passed authorizing the secretary to seal "Lloyd's" bonds to the extent of £7,000, to be deposited with the chairman's promissory note for securing £5,000, in order to discharge the liability of the chairman on the action of Mr. Barrow against him. The bonds (which derive their name from that of the gentleman who first framed them) were afterwards issued, each being for £1,000, and payable to the plaintiff.

They were all in the following form:—

"The Manchester and Milford Railway Company do hereby acknowledge that they stand indebted to William Chambers, of Hafod, in the county of Cardigan, Esquire, in the sum of £1,000, for money due and owing from the said company to the said William Chambers; and the said company for themselves, their successors, and assigns, hereby covenant with the said William Chambers, *his executors and administrators*, to pay to him, his executors, administrators, *and assigns*, the said sum of £1,000, upon the 28th day of May, 1866, and also interest thereon at the £5 per cent. per annum from the date hereof until payment, such interest to be payable half-yearly upon the 1st day of January and the 1st day of July in each year.

"Given under the common seal of the said company the 28th day of May, 1863."

The bonds having been delivered to the plaintiff, he negotiated with a Mr. Denham for a loan of £5,000 on the security

of a mortgage of these bonds, and his own personal covenant to pay the amount. On the 28th of May, 1863, the plaintiff executed the mortgage, and received the mortgage money, which he paid over to Barrow on the 5th of June. At a meeting of the directors on August 5th, in the same year, it was resolved that "the Lloyd's bonds, amounting to £7,000, given as security for the liability of the chairman under the bill for £9,500, held by the Union Bank, be redeemed, and that his expenses in raising that money be paid by the company out of the first moneys in the hands of the company." The bonds, however, were not redeemed; but on the first instalment of interest becoming due, the company refused to pay it. The plaintiff thereupon brought this action.

The following are the principal sections of the various Acts of Parliament relating to railway and other companies, upon which the question turns:—

7 & 8 Vict. c. 85, § 19.—"And whereas many railway companies have borrowed money in a manner unauthorized by their acts of incorporation, or other Acts of Parliament relating to the said companies, upon the security of loan notes, or other instruments purporting to give a security for the repayment of the principal sums borrowed at certain dates, and for the payment of interest thereon in the meantime; and whereas such loan notes or other securities, issued otherwise than under the provision of some Act or Acts of Parliament, have no legal validity, and it is expedient that the issue of such illegal securities should be stopped; but such loan notes or other securities having been issued and received in good faith, as between the borrower and lender, and for the most part for the lawful purposes of the undertaking, and in ignorance of their legal invalidity, it is expedient to confirm such as have been already issued: be it enacted, that from and after the passing of this act, any railway company issuing any loan note, or any negotiable or assignable instrument, purporting to bind the company as a legal security for money advanced to the said railway company, otherwise than under the provisions of some Act or Acts of Parliament, authorizing the said railway company to raise such money, and to issue such security, shall for every such offence forfeit to her Majesty a sum equal to the sum for which such loan note or other instrument purports to be such security. Provided always, that any company may renew any such loan note or other instrument issued by them prior to the passing of this act, or for any period or periods not exceeding five years from the passing of this act."

8 & 9 Vict. c. 16 (Companies Clauses Consolidation Act, 1845), § 38.—And, with respect to the borrowing of money by the company on mortgage or bond, be it enacted as follows:—If the company be authorized by the special act to borrow "money on mortgage or bond," it shall be lawful for them, subject to the restrictions contained in the special act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding, in the whole, the sum prescribed by the special act, and for securing the repayment of the money so borrowed with interest, to mortgage the undertaking and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned. Sections 39—47, 90, 91, were also referred to in the argument.

23 & 24 Vict. c. 175, § 8.—It shall be lawful for the company to borrow *on mortgage* of their undertaking any sums of money not exceeding £185,000; but no part shall be borrowed until the whole of the capital of £550,000 shall have been subscribed for, and until they prove to the justice who is to certify under the Companies Clauses Consolidation Act, 1845, § 40, before he so certifies, that all such capital has been subscribed for *bona fide*, and is held by subscribers or their assigns, and for which such subscribers or their assigns are legally liable, and until one-half of such capital shall have been paid up, and all the money so borrowed shall be applied in carrying the purposes of this act into execution.

A rule having been obtained in Easter Term last by *Lush*, Q. C., in pursuance of the leave reserved,

Borill, Q. C., and *Lucius Kelly*, now showed cause.—Although section 8 of the special act forbids borrowing upon mortgage until certain conditions are fulfilled, which, in this case, are unfulfilled, it does not forbid borrowing upon bonds. A corporation has power, at common law, to borrow for the purposes of its business, unless there is a statutory prohibition. *McCormick* v. *Parry*, 7 Exch. 355. Sections 38—47, 90, 91, of 8 & 9 Vict. c. 16, do not apply to this case. They must be read in connection with section 8 of the 23 & 24 Vict. c. 175, and restricted to borrowing upon mortgage. Again, 7 & 8 Vict. c. 85, § 19, imposes a penalty upon companies for issuing securities not authorized by Act of Parliament; but these bonds are not within the mischief that section was passed to meet, because they are not legally assignable. The power of the company to issue them, whether to pay off debts incurred or to provide for future liabilities, remains, not having been taken

away by statute. They have not, therefore, acted *ultra vires* in sealing these bonds. *South Yorkshire Railway Company* v. *Great Northern Railway Company*, 9 Exch. 55, 642; *Bateman* v. *Mayor of Ashton*, 3 H. & N. 325; 6 W. R. 829; *Payne* v. *Mayor of Brecon*, 3 H. & N. 572; 6 W. R. 801; *Pallister* v. *Mayor of Gravesend*, 25 L. J. Ch. 776; 4 W. R. 478, 768; *Bill* v. *Darenth Railway Company*, 1 H. & N. 305; 4 W. R. 684; *Troup's case*, 29 Beav. 353; 9 W. R. 878; *Hoare's case*, 30 Beav. 225; 9 W. R. 878; *White* v. *Caermarthen Railway Company*, 12 W. R. 68; 33 L. J. Ch. 93. Again, the transaction here is not really a borrowing by the company, but by the plaintiff, and therefore not prohibited even if the defendants' view is the correct one.

Lush, Q. C., and *Charles W. Wood*, *contra*.—Companies like the present defendants are the creatures of statute, and it is a fallacy to suppose they have any common law powers of borrowing. The whole scope of railway legislation shows that they are to exercise no borrowing powers except such as may be *expressly* conferred on them. 7 & 8 Vict. c. 85, § 19, attacked the old system of borrowing, which had been carried to excess. It is true that only a penalty is imposed by that section; but where the Legislature clearly intends to prohibit an act by annexing a penalty to its performance, then the act is itself unlawful. The effect, therefore, of the section is, that a railway company shall only borrow in the manner authorized by the special act. Here that act limits the company's powers to borrowing *on mortgage*, and this is an implied prohibition against borrowing in any other way or any other conditions than those mentioned. 8 & 9 Vict. c. 16, §§ 38—47, support the view we contend for. *Payne* v. *Mayor of Brecon*, *ubi sup.*, and *White* v. *Caermarthen Railway Company*, *ubi sup.*, are distinguishable. Again, this is a borrowing by the company. The bonds are, in reality, a security for money borrowed. They are a part of the machinery of a loan. Lloyd's bonds were never intended to be given for money to be advanced, but only to be a security for money already due. They are accounts stated under seal.

CROMPTON J.—I am of opinion that this rule should be made absolute. The case is one of importance, but it has been very fully argued, and there has been an interval between the arguments, so that I do not now feel any doubt about the matter. I take the law to be, as it was laid down by Parke B., in the *South Yorkshire Railway Company* v. *Great Northern Railway Company*, 9 Exch. 55, 642. "The question," he says (p. 83),

"which arises in this case, though it is one of great importance and some nicety, lies in a very narrow compass. . . . . Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand on a different footing. They relate to the power of one member of a partnership to bind the other, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in the contract, ... one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, and not the other partners. But corporations, which are the creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred." Now, this principle is true of corporations generally; and we have to apply it in this case to a corporation created for a special purpose. I agree with the observations of the same learned judge upon this point:—"Where a corporation," he proceeds, "is created by an Act of Parliament *for particular purposes*, with special powers, then, indeed, another question arises, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the Legislature meant that such a deed should not be made." This, then, is the real question—viz., whether in each particular case the deed in dispute is or is not *ultra vires*. The directors of a company are, I think, rather special than general agents. They have no power to affix the common seal except in certain specified cases. They have no power to do so, where the Legislature says that a particular contract cannot be made. To such a contract they cannot bind the corporation. We must ask, therefore, whether such a bond as that now in question may be entered into by this railway company. I agree with Mr. Lush's argument, that the general scope of legislation on the subject shows that companies like this one should only borrow in the limited mode prescribed by their special act.

Now, in order to see what powers the directors have as special agents, and how their powers are limited, expressly or by implication, our attention is directed, first, to 7 & 8 Vict. c. 85, §

19. The recital of that section is as follows:—"Whereas, many railway companies have borrowed money in a manner unauthorized by their Acts of incorporation or other Act of Parliament relating to the said companies, upon the security of loan notes or other instruments purporting to give a security for the re-payment of the principal sums borrowed at certain dates, &c., and whereas such loan notes or other securities issued otherwise than under the provision of some Act or Acts of Parliament have no legal validity, and it is expedient that the issue of such illegal securities should be stopped." Now, here there is a declaration as express as can be, that "loan notes and other securities, issued otherwise than under the provision of some Act or Acts of Parliament," are illegal. Then come the words which impose a penalty upon the company which shall issue such securities, and, although this part of the section may be somewhat ambiguous, the first part is clear, and is levelled, in my opinion, against any borrowing by railway companies in any manner except that authorized by their special Act. This section, therefore, shows that the Legislature meant the special Acts in each case to be looked at to authorize borrowing powers. I now come to the 8th section of the special Act, which, coupled with the section of the Companies Clauses Consolidation Act, 1845, to which I am about to refer, makes it clear that the Legislature meant to forbid all borrowing except under the special Act. Section 8 of 23 & 24 Vict. c. 175, says that "it shall be lawful for the company to *borrow on mortgage* of their undertaking" on certain conditions, and it is said that this language leaves power to the company to borrow on bond or simple contract—that is, though they can borrow on mortgage only upon certain terms, yet they may borrow when and how they please upon bond. Thus, the giving of a less power expressly, is held to confer upon them a greater power impliedly. I cannot agree in this view, but I consider the power an enabling power, and that the company have the power to borrow in the way prescribed, and in that way only. Then, by section 38 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), it is enacted that "if the company be authorized by the special Act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond . . . . . by an order of a general meeting." This section indicates that it is from their special Acts that the companies are to derive authority to borrow. If they could borrow by loan note, for instance, it would be idle to talk of their being authorized to

borrow by their special Acts. We have also been referred to section 45, requiring a register of mortgages and bonds, and we may ask, where would be the use of such a restriction (and others of a similar kind) if the company could borrow under what Mr. Bovill called their common law power. Upon the whole, therefore, I am of opinion that these directors have a special limited authority, and have no power to borrow unless in the manner authorized by the special Act. Several cases were mentioned during the argument, of which the principal was *Payne* v. *The Mayor of Brecon*, 3 H. & N. 572. But there the corporation entered into the covenant under an express power, and to pay a lawful debt. So again in *White* v. *The Caermarthen Railway Company*, 12 W. R. 68; 33 L. J. Ch. 93, the bond was given for work done, and I do not say that a Lloyd's bond may not be given to a contractor for a legitimate purpose. The company may be indebted to him, and they give him an instrument upon which he may raise money at once, although it is not legally assignable. To a bond so given, I see no legal objection.

I now come to the facts of the case, and, on them, I take it as clearly proved that there was a borrowing here. At first there was a direct borrowing, and, as I consider that to have been illegal, it appears that all that occurred afterwards was illegal. Mr. Chambers, the plaintiff, became primarily liable for the money borrowed, and was actually sued by Barrow for a moiety of the note in which they had joined. Then the scheme was resorted to by the company of issuing these bonds to secure the plaintiff against his liability, and it was resolved that, in order to discharge it, the secretary should be authorized to issue these bonds. Here was a direct authority to raise money given by the company. The bonds were given to the plaintiff accordingly, and were in fact sealed in order to borrow money to pay him. The whole transaction, from first to last, was a loan, whether directly or indirectly. I am of opinion, therefore, that it was an act prohibited by the Legislature, and that the bonds are void.

Blackburn J.—I am of the same opinion. The principle of these cases is accurately stated by Parke B., in the *South Yorkshire Railway Company* v. *Great Northern Railway Company*. [The learned judge here read a portion of the passages set forth in the judgment of Crompton J.] My opinion is, that such a bond as that now in question was not intended to be made, and as I think that the company have a defence *at law*, I do not decide on equitable grounds, and need not consider the

effect of the cases in the Court of Chancery which have been cited, nor whether the plaintiff would, from other circumstances, be entitled to any relief there. This is a railway company created by a special Act. It is a corporation for particular purposes, and on looking at the scheme of legislation, but especially at 7 & 8 Vict. c. 85, § 19, I think the Legislature intended that such a company should not borrow, except in the manner specified by their special Act. The penalty in the section seems attached to the persons who issue the instrument, rather than to the instrument, yet on the whole the meaning seems to me to be, that no borrowing, except under an express power, shall be allowed. Now the bonds in this case are "Lloyd's bonds." They do not purport to be debentures; they are acknowledgments of debts, and may be beneficial and valid if legitimately used, as, for example, where the company are actually indebted to a contractor, when their effect might be to throw on the company the *onus* of proving that there was no debt. But no such bond can create a debt which did not exist previously. And here these bonds were given for money lent. The original transaction was to raise a loan of £10,000, and it was not effected in the manner prescribed by the Legislature. [The learned judge here referred to the facts of the case.] The bonds were sealed and given to Chambers. What he did with them afterwards is not material, though I may observe that he seems to have acted rightly in the matter. They were given to him to enable him to raise money to the amount of £5000, and if the original loan be void, then these bonds given to facilitate it are void also, and in my opinion equally illegal. My brother Shee, who did not hear the whole of the arguments, desires me to say that, as far as he has formed an opinion on the subject, he concurs with the rest of the Court.

Rule absolute.

Attorneys for the plaintiff, *Marriott & Jordan.*

Attorney for the defendants, *Spencer.*

DIGEST OF RECENT CASES.[1]

Admiralty.

The Merrimac was captured at sea by the gunboat Iroquois, and condemned as a prize. The merchant steamer Eagle interfered actively, and probably serviceably, in intercepting and delaying her endeavor to escape; and on the proceedings before the commissioners as to the distribution of the prize money, the master of the Eagle applied to have his vessel declared a joint captor. He stated that his vessel had no commission from the government. The claim was opposed on behalf of the Iroquois. The prize commissioners reported that the Iroquois was the only public ship of the United States present or within signal distance at the time of the capture, and that the capture was made by her, but that the Eagle was present and coöperated in the capture, and the question was then brought before the court.

Held, that as the proceeds of property captured as prize belong exclusively to government, and the statute law of the United States entitles public ships and armed vessels only to a distribution, the Eagle was not entitled to any share in the proceeds.—*The United States* v. *The Steamer Merrimac*.

Charities.

The act of 9 Geo. 2, ch. 36, restrictive of gifts of lands, and of money to be laid out in lands to charitable uses, was never in force in the colony of Rhode Island. It did not extend to the colonies, was passed after our settlement, was not agreeable to our constitution, and was not included in the statutes of England and Great Britain enumerated as in force here, in the

[1] These abstracts have been taken from the reports of recent English cases in the different periodicals, mainly from the *Weekly Reporter*, an excellent and reliable journal of legal matters, from advance sheets of the official reports, kindly furnished us by the reporters of the various States in which the decisions were rendered, and from reliable legal journals in this country.

colonial act of 1750, found in the Digest of 1767, p. 55. In the second section of that act, which embodies with a slight alteration the colonial act of 1760, the words "Laws of England" do not embrace statutes of Great Britain. The purpose and construction of the above act of 1750 are shown and illustrated by its history.

The jurisdiction of chancery over trusts for charitable uses did not owe its origin to statute, but existed in England prior to the statute 43d of Elizabeth; and is not here confined to the two kinds of charitable trusts, to wit: "for the relief of the poor, and bringing up children to learning," for which a special jurisdiction was first provided by the colonial act of 1721 (Dig. 1730, p. 122; Dig. 1744, p. 87); but if this were so, the act as amended and as it now stands in the Digest of 1844 is, like the statute of Elizabeth, retrospective in its character, and extends to charitable gifts *heretofore* as well as hereafter given for the relief of the poor, or bringing up of children, "or any other specific purpose," and this leaves within the jurisdiction of our court of chancery all gifts to charitable uses which were good at common law.

A gift of land, made in 1775, "for the building and keeping built and erected a meeting-house for carrying on the public worship of Almighty God, after the modes and ways, rules and establishments, of the sect or denomination of Christians called Baptists, or Antipedo Baptists, to wit: those who hold strictly to the principles of the doctrine of Christ as laid down in the first and second verses of the sixth chapter of Saint Paul's Epistle to the Hebrews, and who hold communion with no other: and for the use of the present society in Johnston, or assembling there under the pastoral care of the Reverend Elder Samuel Winsor, and such as may succeed them the said society forever, holding the same principles strictly as aforesaid," is good in Rhode Island as a gift to charitable uses at the common law, notwithstanding the colonial act of 1721, and is within the statute of 43 Elizabeth and the decisions thereunder, and the act in the Digest of 1844, operating retrospectively; nor does the use of the lands given result to the heirs of the donor upon the change of views, and removal from the neighborhood of the society existing at the time of the gift, but under the words "and such as may succeed them forever, holding the same principles strictly as aforesaid," is a subsisting trust for such a society when it may present itself and ask for a place of worship on the lands,—the legal estate remaining in

the grantees and their heirs, to preserve it.—*Potter et al.* v. *Thornton*, 7 R. I. (4 Ames) 252.

Dower.

If an execution creditor quitclaim to a third person, lands which have been levied on, before the time for the redemption from the levy has expired, the widow of the creditor will not be entitled to dower therein.—*Foster* v. *Gordon*, 49 Me. 54.

Divorce.

Connivance is knowledge of the conduct complained of, and acquiescence in it.

Delay is *per se* no bar to a suit for judicial separation, but, in conjunction with other circumstances, may induce the court to refuse a decree.—*Boulting* v. *Boulting*, Divorce Court, Jan. 16.

Equity.

Equity regards that as done which is agreed to be done. Accordingly, a court of equity will correct mistakes in conveyances, when clearly proved, though by oral evidence only; and will make the instrument such, both in its form and effect, as will fulfil the intention of the parties.

And in this respect it makes no difference whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect.—*Kennard* v. *George*, 44 N. H. 440.

Where an estate is vested in trustees, who sell plots for building, subject to restrictive covenants, each purchaser has an equity against the other purchaser, to compel an observance of the covenants.

Such equity may be lost by acquiescence.

In a suit to enforce such an equity, the trustees are necessary parties, and the remaining purchasers ought to be represented on the record.—*Eastwood* v. *Lever*, Lord Justice's Court, Dec. 9, 1863.

Where a plaintiff submitted to a nuisance for nearly three years, without taking any legal proceedings, the court refused him an injunction at the hearing, and dismissed his bill, without prejudice to an action at law.—*Swaine* v. *The Great Northern Railway Company*, Lord Justice's Court, Jan. 25.

A entered into an agreement to convey a parcel of real estate to B, in consideration of a sum of money which was paid. The land was conveyed by deed, in which B's wife joined, but by mistake of the conveyancer, another party was named as grantee. On an action brought by B to reform the deed,

Held, that A's wife could be compelled to join in executing a new and corrected conveyance.—*Hensing* v. *O'Neills*, N. Y. Sup. Ct. April, 1864.

Evidence.

In an action on the case against a postmaster for negligence, by which a letter of the plaintiff was lost, evidence of specific acts of negligence in relation to other letters, is not admissible to prove negligence in respect to the letter in question.—*Wentworth* v. *Smith*, 44 N. H. 419.

Executor.

A general release of all demands may operate to discharge debts due to the releasor as executor, although the lease be not signed as such; unless the general words of the release are restrained and limited, by the circumstances, to other demands.

A release under seal is conclusive between the parties, and, when made by an executor, will, in the absence of fraud, bind also the residuary legatees.

In the case of a loan by an executor of trust funds, to a firm of which he is a member, a repayment to him will in general exonerate the firm, although all the partners had notice of the trust character of the funds; and where the executor drew money from the firm from time to time, without stating on what account, but the same was charged in his private account;—*Held*, that a subsequent adjustment and application of money, so drawn, to the payment of money loaned, was valid under the circumstances, even as against the residuary devisees;

although the money had been credited to the estate on the books of the firm.—*Sherburne* v. *Goodwin*, 44 N. H. 271.

Fixtures.

Tenants' fixtures are not chattels till severed; and it is competent to a landlord to make an agreement with his tenant, which shall, without an abandonment by the tenant of his property in such fixtures during the term, in the event of an execution against the tenant, enable the landlord to re-enter and retain such fixtures against the execution creditor.

By an interpleader issue, the following appeared:—By an agreement not under seal, it was agreed, between the lessor and F, that F should have immediate possession of premises, which he was to fit up for musical performances, and of which he was, upon complying with the agreement, to have a lease, the terms of which were to be binding upon him upon entering. The lease contained an agreement that in case the term should determine by effluxion of time, but in no other case, it should be lawful for F, within twenty-one days after the expiration of the term, but not during any other period, to remove any tenant's fixtures which he might have attached, unless the lessor should elect to purchase; and provided, that in case F became bankrupt, or a writ of execution should be levied or executed by seizure on the premises, it should be lawful for the lessor to re-enter, and seize, and retain for her use, as her own, all fixtures whatsoever, whether tenant's or trade fixtures, which should then be upon the premises; and that, on such re-entry, the term should be absolutely determined. F entered, and having subsequently annexed certain fixtures which the jury found to be tenant's fixtures, within a few weeks the whole were seized in execution against him, and nine days after the execution the lessor served the sheriff with notice, claiming all the fixtures as her property.

Held, (reversing the judgment of the Exchequer,) that the clauses above were inconsistent with the ordinary right of a tenant to disannex tenant's fixtures during the term, and that the lessor was entitled to retain these tenant's fixtures against the execution creditor.—*Dumerque* v. *Rumsey et al.*, Exch. Chamb. Dec. 1, 1863.